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THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CALIFORNIA BERRY CULTIVARS, LLC,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, a corporation,

Defendant.

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, a corporation,

Cross-Complainant,

v.

CALIFORNIA BERRY CULTIVARS, LLC,  
DOUGLAS SHAW, and KIRK LARSON,

Crossclaim Defendants.

Case No. 3:16-cv-02477-VC

**MOTION TO EXCLUDE EXPERT  
TESTIMONY BY DAVID NOLTE  
UNDER FRE 702**

1 The Regents of the University of California (“the University”) respectfully request that the  
 2 Court exclude CBC’s damages expert David Nolte from offering any testimony at trial because  
 3 his opinions do not meet the standard for admissibility set out by Federal Rule of Evidence 702.

4 **A. Expert Testimony Based on Unfounded Assumptions Is Not Admissible**

5 Expert opinions based on unfounded assumptions do not meet the standard of admissible  
 6 expert testimony set out by the Federal Rules of Evidence, because they are not “based on  
 7 sufficient facts or data,” and do not apply reliable analysis to “the facts of the case.” Fed. R.  
 8 Evid. 702(b) and (d). “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a  
 9 district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of  
 10 the expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

11 When expert opinions are not based on contested facts, but instead on unfounded  
 12 assumptions, the proper remedy is not cross-examination, but exclusion. *McGlinchy v. Shell*  
 13 *Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (finding no abuse of discretion to exclude expert  
 14 whose “speculation about the amount of appellants’ damages has scant basis in the record” and  
 15 whose “study rests on unsupported assumptions and unsound extrapolation”); *Ollier v.*  
 16 *Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (affirming exclusion of  
 17 testimony that was “unsupported by the facts”); *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d  
 18 851, 853 (9th Cir. 1997) (affirming exclusion of testimony where the expert was unable  
 19 “satisfactorily to explain the reasoning behind his opinions” which were “unsubstantiated and  
 20 subjective, and therefore unreliable and inadmissible”); *Goomar v. Centennial Life Ins. Co.*, 855  
 21 F. Supp. 319, 326 (S.D. Cal. 1994), *aff’d*, 76 F.3d 1059 (9th Cir. 1996) (“If proffered expert  
 22 testimony is no more than unsupported speculation, the trial judge should exclude it.”).

23 Courts are particularly likely to find expert testimony inadmissible when the expert relies  
 24 on self-serving assumptions that the party proffering that expert told that expert to make. *Dep’t of*  
 25 *Toxic Substances Control v. Technichem, Inc.*, No. 12-cv-05845-VC, 2016 U.S. Dist. LEXIS  
 26 33379, at \*2 (N.D. Cal. Mar. 15, 2016) (excluding expert’s testimony because “[w]hen he is not  
 27 simply speculating, Dr. Everett often does no more than regurgitate information given to him by  
 28 other sources (including self-serving assertions by the defendants).”). For example, the Third

1 Circuit affirmed the exclusion of expert testimony where the expert relied solely on the plaintiff's  
 2 own statements about his future earning potential, and the "figure derived from that reliance was  
 3 thus without proper foundation and insufficient for a jury properly to assess [plaintiff's]  
 4 damages." *Benjamin v. Peter's Farm Condo. Owners Ass'n.*, 820 F.2d 640, 643 (3d Cir. 1987).  
 5 As in *Benjamin*, Mr. Nolte's disclosure is a "castle made of sand." *Id.* (Internal quotations  
 6 omitted).

7 **B. Mr. Nolte's Opinions Do Not Analyze "the Facts of the Case" as Rule 702 Requires**

8 Mr. Nolte's opinions are not based on an expert analysis of real data; indeed, they could  
 9 not have been, given that he spent only two days on the entire process of reviewing the  
 10 information on which he supposedly relied, analyzing it, forming his opinions, and drafting his  
 11 initial eight page disclosure. Instead of analyzing and citing facts, Mr. Nolte simply assumed key  
 12 "facts" — in most cases, because CBC told him to make those assumptions — even when those  
 13 assumptions are unsubstantiated by anything in the record. His opinions are therefore not "based  
 14 on sufficient facts or data," do not apply any reliable analysis to "the facts of the case," and  
 15 therefore should be excluded. Fed. R. Evid. 702(b) and (d).

16 CBC simply told Mr. Nolte to assume those key "facts," and Mr. Nolte did so uncritically.  
 17 Two of the eight pages of Mr. Nolte's first report summarize statements made by Dr. Shaw and  
 18 Lucky Westwood during a single phone call with Mr. Nolte. (Ex. 1 at 3-4; see Ex. 2 at 116:13-  
 19 117:22.) Mr. Nolte's report then purports to apply economic analysis to the things CBC told him.  
 20 Mr. Nolte apparently did not believe it was his responsibility to check the assumptions CBC gave  
 21 him against the facts in the record, but expert testimony must be excluded where it plainly ignores  
 22 the facts, and relies instead on unsubstantiated assumptions. *McGlinchy*, 845 F.2d at 807  
 23 (excluding testimony with "scant basis in the record" and which "rests on unsupported  
 24 assumptions.")

25 **1. Mr. Nolte Assumes CBC Started its Breeding Program from Scratch,**  
 26 **Ignoring that CBC Used University Cultivars**

27 One of Mr. Nolte's most prominent unfounded assumptions is that CBC's breeding  
 28 program "started from scratch." His analysis purportedly compares where CBC would be if the

1 University had “shared” the cultivars the University owned with CBC in 2014, on the one hand,  
 2 to where CBC’s program is today, on the other. Mr. Nolte — as he was instructed to do —  
 3 assumes that CBC “faced delays having to start from scratch.” (Ex. 1 at 5.) “Q. And then you  
 4 assume they had to start from scratch then in 2014, rather than having access to the materials,  
 5 correct? A. That is what I was told the fact witnesses will -- will be stating.” (Ex. 2 at 25:2-6.)

6 CBC did not start from scratch. Instead, it is now undisputed that CBC conducted a  
 7 breeding program that made extensive, infringing use of the University’s patented cultivars.  
 8 (Ex. 3 at 15:17-16:18.) Recently produced emails also confirm that CBC’s breeding program also  
 9 used CSG cultivars chosen from Dr. Shaw from the very beginning, despite the fact that it had no  
 10 more right to use those cultivars than they did the patented cultivars. (ECF No. 203-6; Ex. 4.)

11 Mr. Nolte’s analysis falls apart if CBC actually had and used the University’s plant  
 12 materials, as the record shows it did; because CBC has had access to these materials since 2014, it  
 13 has not been “delayed” by the University’s decision not to license that material. Indeed, Mr.  
 14 Nolte himself candidly admitted as much:

15 Q. Mr. Nolte, if the jury concludes that CBC had access to the  
 16 U.C. strawberry plant materials from December 1st, 2014 forward,  
 then your analysis does not make sense, does it?

17 A. Okay. Your hypothetical is 100 percent of the materials have  
 18 been at CBC all along and the entire factual premise of CBC’s  
 19 claim is a boldfaced lie, and if that is your hypothetical, sure, you  
 20 don’t need my damage calculation ’cause the jury wouldn’t –  
 wouldn’t believe anything that CBC is saying ’cause you just, in  
 your hypothetical, said that it’s a big lie.

21 (Ex. 2 at 126:1-12.) His testimony is therefore “unsupported by the facts” and is inadmissible.  
 22 *Ollier*, 768 F.3d at 861.

23 **2. Mr. Nolte Assumes That CBC Will Not Release a Cultivar until 2027,**  
 24 **Contradicting CBC’s Admissions and All Other Available Facts**

25 Mr. Nolte’s entire analysis depends on a theory that CBC has been delayed in releasing  
 26 commercial cultivars. The single most important input to that analysis, therefore, is when this  
 27 supposed delay started, and how long it lasted. Mr. Nolte chose not to analyze any of the facts  
 28 that were available to him from discovery to support his theory of delay; instead, he

1 unquestioningly used the unfounded assumptions Dr. Shaw told him to make.

2 Mr. Nolte assumes that CBC will not release a cultivar until 2027, and purportedly  
3 analyzes the effect of that delay on CBC's revenues. But CBC witnesses' own testimony was that  
4 they hope to release a cultivar in 2019 or 2020, and that the development lifecycle to release a  
5 new variety is typically six years. (Ex. 5 at 147:9-20, 156:4-19; Ex. 6 at 43:14-44:8.) Six years  
6 from the beginning of CBC's breeding program (2014), is 2020, which is when CBC actually  
7 expects to release a cultivar. There is no basis in the record for assuming that CBC will be  
8 delayed at all, and certainly not until 2027, and Mr. Nolte cites none; instead, he cites the fact that  
9 Dr. Shaw told him to make that assumption.

10 Mr. Nolte was told by Dr. Shaw that he should assume that the University's decisions  
11 would cause an eight-year delay in CBC's breeding program. ("Q. Where did you get the idea  
12 that it would be an eight-year delay? A. I was told that in the discussions that I had which defined  
13 this assignment.") (Ex. 2 at 26:5-8.) Dr. Shaw apparently offered no support for this assumption  
14 of an eight year delay, and Mr. Nolte cites none. Indeed, Mr. Nolte testified that he simply  
15 accepted that assumption from Dr. Shaw and moved on with his analysis.

16 Q. You assumed an eight-year delay in your report because you  
17 were told by the fact witness that is what it would be, correct?

18 A. Correct.

19 (*Id.* at 31:9-12.) He refused to say whether he believed that an eight year delay was a factually  
20 sound assumption. "I'm not expressing opinions on that . . . I did the calculation on eight years  
21 *because that's what I was told.*" (*Id.* at 28:2-11.) (emphasis added).

22 Mr. Nolte further assumed the "delay" would start in 2019, because Dr. Shaw told him to  
23 make that assumption. He then added Dr. Shaw's 8-year delay assumption to the assumed delay  
24 start date, leading him to a 2027 date when CBC will supposedly release its first cultivar. (*Id.* at  
25 23:4-24:3.) Again, Mr. Nolte could cite to nothing in the record that supported this assumption.  
26 "Q. I'm asking you as an expert witness calculating damages, can you tell me when the eight-year  
27 delay started and when it ended for purposes of your calculation, can you tell me that? A. As a  
28 factual matter, no. Because I'm not a fact witness." (*Id.* at 31:3-8.) When asked whether it's

important when calculating damages to know when the purported delay starts and ends, he agreed (as of course he must), but could only say “if you change that by a few years it doesn’t matter.” (*Id.* at 28:18-19.)

Ms. Distler pointed out these errors in her Rebuttal Report. (Ex. 7 at 94-96.) In response, Mr. Nolte offered a Supplemental Report in which he acknowledged that “perhaps a shorter period could be applicable,” and attempted to offer a laundry list of different calculations for different periods of delay. (Ex. 8 at 7.) He simply applied net present value calculations to different combinations of delays and starting dates, but never says which, if any, are actually appropriate given the facts of this case, because he has no basis to do so. (*Id.* at Ex.: Lost Revenue Model.)

Moreover, all of the calculations in Mr. Nolte’s Supplemental Report, by Mr. Nolte’s own admission, are wrong. His stated assumption is that “there should be no lost revenue or lost profit in a but-for scenario until 2019,” when the delay would purportedly start, because “[t]hat is the input I was given by Dr. Shaw.” But every alternative scenario he presents include damages accruing before 2019. (Ex. 2 at 36:18-22, 37:16-25; Ex. 8: Lost Revenue Model.) He agreed that this was an error when confronted with this point at his deposition. (Ex. 2 at 36:18-38:24.)

This Supplemental Report does nothing to ground Mr. Nolte’s analysis in “the facts of the case.” Fed. R. Evid. 702. Expert opinions that simply “regurgitate information” the expert has been given by his or her client are inadmissible. *Dep’t of Toxic Substances Control*, 2016 U.S. Dist. LEXIS 33379, at \*2.

### **3. Mr. Nolte Assumes That Cultivars Will Be Much More Profitable Than The Undisputed Facts Show**

Mr. Nolte’s opinion relies on an assumption that patented cultivars will remain highly profitable in the last years of the patent’s term. Undisputed historical data, which Mr. Nolte declined to analyze, proves that, again, Mr. Nolte substitutes unfounded assumption for expert analysis of the facts.

Mr. Nolte’s analysis supposedly assumes that the cultivars CBC would have released but for the purported “delay” would have been as profitable as the University’s released cultivars

1 have been. Setting aside the lack of support for that assumption, a critical aspect of his supposed  
2 analysis is the assumptions he makes about how much licensing revenues each of those cultivars  
3 will generate over the last years of their patent term. He used, as examples, several University  
4 cultivars which have not reached the end of their patent term. Yet again, Mr. Nolte did not  
5 himself decide which were appropriate representative cultivars; that assumption was “provided by  
6 Dr. Shaw.” (Ex. 2 at 39:25.)

7 Mr. Nolte then makes “projections” about the future revenues that certain patented  
8 cultivars will generate in the second half of the patent’s term. (Ex. 1 at 13 (Trend Analysis  
9 Projections).) But those “projections” were based on nothing in the facts or any defensible  
10 economic analysis. For example, he assumed that the Ventana patented cultivar will make  
11 exactly \$500,000 in each of years 16-20 of its patent term. (*Id.*) He candidly admitted that he did  
12 not perform any calculations using the historical data available to him that showed revenue for  
13 University cultivars in years 16-20 of their patent terms. (Ex. 2 at 46:2-47:15.) Instead, his  
14 opinions completely ignore that data.

15 Had Mr. Nolte analyzed the historical data, which is undisputed, he would have had to  
16 acknowledge that the University’s licensing revenues decline substantially in the last years of a  
17 cultivar’s term; that is, the facts he ignored show that his assumption was wrong. The result is  
18 that his calculations grossly overstate the revenues each “exemplar” cultivar is likely to generate.  
19 For example, Ms. Distler’s analysis — which Mr. Nolte has not attempted to rebut — found that  
20 in the last *eight* years of a cultivar’s term, historically, they have generated only 17.2% of the  
21 revenue they generated in their first twelve years. (Ex. 7 at Schedule 21b.) Mr. Nolte’s  
22 projections for the Albion cultivar, for example and by contrast, assume that in its last eight years  
23 it will generate 48.7% of the revenues it generated in the first twelve years. (*Id.*) This leads Mr.  
24 Nolte to overstate the royalties Albion is likely to generate by more than \$4.9 million. (*Id.*) Mr.  
25 Nolte’s projections for the other cultivars he purportedly analyzed were similarly, drastically,  
26 overstated. (*Id.*) This is not because Mr. Nolte relied on different contested facts than Ms.  
27 Distler; it is because Mr. Nolte relied on no facts at all, only assumptions, and his opinions  
28 therefore are inadmissible. *McGlinchy*, 845 F.2d at 807.



1           **4. Mr. Nolte Assumes that the University Would Have Given CBC A Free**  
 2           **License**

3           Mr. Nolte assumes that the University would have given CBC a royalty-free license to  
 4           breed using UC's germplasm. The University did not do so, and there are no facts set out in Mr.  
 5           Nolte's report to support such an assumption. Moreover, at deposition Mr. Nolte refused to even  
 6           try to explain how this assumption — which his report indisputably makes — is economically  
 7           sound; instead, he disavowed all responsibility for the assumptions stated in his report. When  
 8           asked if he assumed a royalty-free license, he offered the following admission, which underlines  
 9           the inadmissibility of his opinions: "Well, if you're asking me whether it's in my report, sure, it's  
 10          in my report. But -- but no, *I really didn't write it*. This is not a conclusion I'm reaching." (Ex. 2  
 11          at 93:12-24) (emphasis added.) Yet again, Mr. Nolte was unable to "satisfactorily explain the  
 12          reasoning behind" his "unsubstantiated and subjective" opinion, and that opinion is therefore  
 13          inadmissible. *Diviero*, 114 F.3d at 853.

14           **5. Mr. Nolte Could Not Possibly Have Reviewed "the Facts of the Case"**

15          An expert such as Mr. Nolte must base his testimony "on sufficient facts and data," and  
 16          apply his expertise to "the facts of the case." Fed. R. Evid. 702. The chronology of Mr. Nolte's  
 17          disclosure makes clear that he used, at most, two days to review the record and write his opening  
 18          report. It is clear that at least one of the reasons he relied on the assumptions supplied by CBC, as  
 19          described above, rather than "the facts of the case" is that he could not possibly have analyzed  
 20          those facts with the rigor required by Rule 702 in the time he spent.

21          CBC did not disclose Mr. Nolte under the Protective Order as a potential expert until  
 22          January 18 at 5pm, two days before the deadline for expert disclosures. (Ex. 9.) Mr. Nolte  
 23          testified that he had spent "something in the vicinity of two days" on his initial report, confirming  
 24          that he started working no earlier than he was disclosed. (Ex. 2 at 8:4-8.)

25          Moreover, given CBC's late disclosure, there were fewer than twenty-four hours in which  
 26          Mr. Nolte was able to view any information designated as confidential by the University. This  
 27          information is at the heart of Mr. Nolte's opinion, most importantly the University's historical  
 28          revenues, which form the basis of his calculation of damages. The Protective Order provided the



University fourteen days from disclosure in which to decide whether to object to Mr. Nolte seeing confidential information. (ECF No. 52 at 11.) As a courtesy, the University expedited its vetting — taking only two of the fourteen days — and the parties agreed to a one day extension on service of opening reports (until January 21). The University informed CBC that it did not object to Nolte reviewing University confidential information on January 20 at 9:39 pm. (Ex. 10.) CBC served Mr. Nolte’s report at 8:34 pm on January 21. (Ex. 11.)

This is a case with complicated facts. Mr. Nolte could not have developed, articulated, and served an opinion that would help the jury understand those facts in two days, nor could he have analyzed the relevant facts in a twenty-four hour period with the level of care and rigor Rule 702 requires. This explains why his report is not tied “to the facts of the case,” but does not excuse that failure.

### **C. Conclusion**

For all the foregoing reasons, the University respectfully requests that the Court exclude Mr. Nolte from offering any testimony at trial.

Dated: April 17, 2017

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WESLEY E. OVERSON  
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By: /s/ Matthew A. Chivvis  
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UNITED STATES DISTRICT COURT  
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CALIFORNIA BERRY CULTIVARS, LLC,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF  
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Defendant.

THE REGENTS OF THE UNIVERSITY OF  
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Cross-Complainant,

v.

CALIFORNIA BERRY CULTIVARS, LLC,  
DOUGLAS SHAW, and KIRK LARSON,

Crossclaim Defendants.

Case No. 3:16-cv-02477-VC

**DECLARATION OF MATTHEW  
CHIVVIS IN SUPPORT OF THE  
UNIVERSITY'S MOTION TO  
EXCLUDE EXPERT TESTIMONY  
BY DAVID NOLTE UNDER FRE  
702**

1 I, Matthew A. Chivvis, do hereby declare as follows:

2 1. I am a partner with the law firm of Morrison & Foerster LLP and an attorney of  
3 record for Movant The Regents of the University of California (the "University") in the above-  
4 captioned matter. I am admitted to practice law in the State of California and before this Court. I  
5 submit this declaration in support of The Regents of the University of California's Motion to  
6 Exclude Expert Testimony by David Nolte Under FRE 702. I have personal knowledge of the  
7 facts stated in this declaration, and I could and would competently testify to them if called as a  
8 witness.

9 2. Attached as **Exhibit 1** is a true and correct copy of the Expert Report of David  
10 Nolte, served on January 21, 2016.

11 3. Attached as **Exhibit 2** is a true and correct copy of excerpts of the transcript of the  
12 March 14, 2016, Deposition of David Nolte.

13 4. Attached as **Exhibit 3** is a true and correct copy of excerpts of the transcript of the  
14 hearing before this Court in the above-captioned matter on September 22, 2016.

15 5. Attached as **Exhibit 4** is a true and correct copy of Appendix B to the Corrected  
16 Expert Report Dr. Stephen Dellaporta, served on February 1, 2017.

17 6. Attached as **Exhibit 5** is a true and correct copy of excerpts of the transcript of the  
18 November 29, 2016, Deposition of Lucky Westwood.

19 7. Attached as **Exhibit 6** is a true and correct copy of excerpts of the transcript of the  
20 December 8, 2016, Deposition of Douglas Shaw.

21 8. Attached as **Exhibit 7** is a true and correct copy of excerpts from the Rebuttal  
22 Expert Report Carrie L. Distler, served on February 21, 2017.

23 9. Attached as **Exhibit 8** is a true and correct copy of excerpts from the Supplemental  
24 Expert Report of David Nolte, served on March 9, 2017.

25 10. Attached as **Exhibit 9** is a true and correct copy of an email sent by Alexis Smith  
26 on January 18, 2017.

27 11. Attached as **Exhibit 10** is a true and correct copy of an email sent by Rachel  
28 Krevans on January 20, 2017.

1           12. Attached as **Exhibit 11** is a true and correct copy of an email sent by Alexis Smith  
2 on January 21, 2017.

3  
4 I declare under penalty of perjury that the foregoing is true and correct.

5 Executed on May 1, 2017, in San Francisco, CA.

6  
7 /s/ Matthew A. Chivvis

8 MATTHEW A. CHIVVIS  
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# **Exhibit 1**

**Redacted Version of  
Document Sought to  
Be Sealed**



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(213) 787-4100  
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January 21, 2017

Frederick McKnight, Esq.  
Jones Day  
555 S. Flower Street, 50th Floor  
Los Angeles, CA 90071

Dear Mr. McKnight:

This report is provided in connection with California Berry Cultivars, LLC ("CBC") vs. The Regents of the University of California ("UC") (USDC Case No. 3:16-cv-02477) to the extent possible at this time.

## **I. DESCRIPTION OF ENGAGEMENT**

Fulcrum Financial Inquiry LLP ("Fulcrum") was asked to calculate CBC's lost profit damages arising from UC's failure to provide CBC nonexclusive access to the Materials (defined subsequently) as of December 1, 2014, which would have allowed CBC personnel to continue development, patenting, and licensing efforts.

In addition to these damages, Fulcrum understands that Drs. Shaw and Larson are entitled to royalties on UC-patented cultivars for which Drs. Shaw and/or Larson are the inventors. Any such amounts owed are not calculated as part of this report or Fulcrum's assignment.

Fulcrum assumes that CBC is able to prevail on its liability claims, for which Fulcrum expresses no opinion.

## **II. FACTUAL & LEGAL BACKGROUND**

This section provides background that provides context to this report. Although Fulcrum is capable of summarizing information contained in this section (and may need to do so as part of providing background to any testimony), Fulcrum is not expressing an opinion of any facts contained in this section.

### **A. Employment and Strawberry Breeding Program Background**

Based on complaints filed by both CBC and UC, the employment history and description of the UC Davis strawberry breeding program ("SBP") appear to be substantially the same for purposes relevant to Fulcrum's calculations. Specifically:

1. Douglas Shaw Ph.D. was a Professor of Plant Sciences at UC's Davis campus, with a special focus in genetics starting in 1986. Dr. Shaw was employed at the UC Davis strawberry breeding program ("SBP") starting in 1988.
2. Kirk Larson Ph.D. was employed at the UC Davis SBP starting in 1991.
3. Drs. Shaw and Larson retired from the UC's employ in November 2014.

Jones Day  
January 21, 2017  
Page 2 of 8

The summary of a UC Internal Audit report on the UC SBP starts with the following background:<sup>1</sup>

*"California is the nation's leading producer of strawberries. In 2013, over 2.3 billion pounds of strawberries were harvested in California, comprising approximately 88% of the fresh and frozen strawberries in the United States. According to the California Department of Food and agriculture (CDFA), strawberries are one of California's top 20 crop and livestock commodities. University of California (UC) produced varieties make up an estimated 80% of California's strawberry production.*

*UC Davis' SBP began in the 1930s and has continued to the present day. The SBP has been responsible for the release of a number of notable strawberry varieties, with over 30 patented varieties developed in the last six decades. ...*

*Until their retirement in November 2014, there were two strawberry breeders (breeders) dedicated to the SBP. Both were faculty members in the UC Davis Department of Plant Sciences (Plant Sciences) within the College of agricultural and Environmental Sciences (CA&ES). The breeders were responsible for developing the strawberry varieties that are the foundation of the SBP ...*

*Strawberry royalties have been trending upward over the past five years. During fiscal year (FY) 2012 – 2013, UC collected over \$7.5 million in gross strawberry licensing fees and royalties from UC Davis varieties. ...*

*The SBP is currently at a crossroads with the retirement of the breeders who have been the driving force behind the SBP over the last few decades. ..."*

## **B. CBC's Contentions**

For purposes only of understanding the calculations Fulcrum described herein, Fulcrum understands that CBC contends:

1. Upon their retirement, Drs. Shaw and Larson (i) had a nonexclusive right (license) to use the results of their research, plant materials and related information (collectively, the "Materials"), and (ii) assigned their rights to the Materials to CBC.
2. The Materials include (i) approximately 168 cultivars developed by Drs. Shaw and Larson which are subject to a pending United States plant patent application, and (ii) approximately 250 plant varieties developed by Dr. Shaw and Larson that may have value as cultivars and breeding stock. The Materials are a subset of the full collection of strawberry plant materials and information within the UC strawberry breeding program, and do not include any plants for which the UC had obtained a patent.
3. UC violated their obligation to Drs. Shaw and Larson by withholding the Materials from CBC, and not safeguarding the living plants that will allow the Materials to now be provided to CBC in a reasonably usable form.

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<sup>1</sup> December 2014 UC Internal audit report regarding the UC strawberry breeding program, project #14-75 (UC STRAW2 00077123 – 184), pages 2 - 3 [citations omitted]



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January 21, 2017  
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### **C. CBC's Expectations of what CBC Could Accomplish**

Fulcrum discussed with Dr. Douglas Shaw and Mr. Lucky Westwood what CBC would be capable of accomplishing (i) absent UC's withholding of the Materials and (ii) in the actual conditions that CBC now faces. Their comments included:

1. Drs. Shaw and Larson retired from UC in November 2014. At that time, the transition cultivars comprised of more than 800 varieties, which were viable and in good health, approximately 250 of which, in CBC's judgment, warranted further evaluation and development as cultivars and to serve as breeding stock for annual crosses beginning 2015. These counts excluded all plants for which UC has patents or patents pending.
2. The following nine cultivars were developed by Drs. Shaw and Larson and have at least five years of licensing history:<sup>2</sup>
  - a. Camino Real
  - b. Ventana
  - c. Albion
  - d. Palomar
  - e. Monterey
  - f. San Andreas
  - g. Portola
  - h. Benica
  - i. Mojave

Earlier cultivars included the efforts of other developers. The nine cultivars listed above are a good cross-select of the type of work that would be expected from CBC's efforts. They include cultivars that were both commercially successful and not commercially successful, as well as a representative mix of short-day and day-neutral cultivars.

3. Absent UC's wrongful conduct, CBC would have been able to patent the first cultivar in 2018 and commercialize this cultivar in 2019.
4. The cultivar development cycle typically lasts eight years. Since CBC had to start from scratch, the actual damages reflect the loss of eight missing cultivars that would have been developed earlier.
5. CBC could be expected to generate at least one new patented cultivar per year, on average.
6. Improvements in the licensing practices used by UC that will be implemented by CBC include:
  - a. Use of market royalty rates, which are higher than what UC has used; and
  - b. More rapid licensing to growers outside of California by eliminating the two-year preferred period that has existed for California growers;<sup>3</sup>

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<sup>2</sup> This list is consistent with UC STRAW2 00075847

<sup>3</sup> Paragraph 7 of UC's November 21, 2016 Third Amended Cross-Complaint

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- c. Greater use of compliance audits to encourage/enforce complete and accurate reporting by growers;<sup>4</sup> and
- d. Not engaging in practices found by the California State Auditor to have resulted in the SBP not receiving all royalties to which it otherwise would be entitled.<sup>5</sup>

An increase in California royalty rates from \$8 per thousand plants to \$10 per thousand plants would, by itself, increase royalties by 25 percent, with additional royalty increases occurring for the other reasons identified.

7. U.S. patents for plant materials have a twenty year life. Foreign licensing is an important part of the royalties, with such foreign licensing often lasting more than the period for U.S. patent protection.

### **III. INFORMATION RELIED UPON**

In addition to my experience and training, Fulcrum relied upon the following information in preparing this report, each of which is of a type that is reasonably relied upon by experts in my field:

1. Background materials, as follows:
  - a. CBC's May 2, 2016 Complaint filed in the Alameda Superior Court
  - b. UC's November 21, 2016 Third Amended Cross-Complaint
  - c. Presentation regarding the UC strawberry breeding program, entitled "Addressing 21<sup>st</sup> Century challenges through genetic Innovation"<sup>6</sup>
2. Interview with Dr. Douglas Shaw and Mr. Lucky Westwood, the results of which are summarized in the preceding section
3. UC licensing results of certain cultivars, as follows:
  - a. UC STRAW2 00058007 and UC STRAW2 00075844, both of which show plants licensed from 1991 through 2014
  - b. UC STRAW2 00075847, showing royalties from 1994 through 2016
  - c. UC STRAW2 00075842, showing "inventor shares", aka Exhibit 102 from the Shaw deposition
4. December 14, 2015 memorandum discussing SBP royalty rates (UC STRAW2 000085284 – 7)
5. December 2014 UC internal audit report regarding the UC strawberry breeding program, project #14-75 (UC STRAW2 00077123 – 184)
6. California State Auditor Report 2014 – 121, dated June 9, 2015 (UC STRAW2 00077360 – 408)
7. Other documents and publicly-available information, as referenced herein

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<sup>4</sup> See comments contained in the December 2014 internal audit report on the SBP program on pages 5 and 12.

<sup>5</sup> California State Auditor Report 2014 – 121, dated June 9, 2015

<sup>6</sup> <http://gcr.ucdavis.edu/state-govt/capitol-speaker-series/events/strawberry.pdf>

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Fulcrum had available, and considered, additional information that does not directly enter into the calculations contained herein. This additional information generally consist of:

1. Depositions and exhibits thereto, as follows:
  - a. December 8, 2016 for Douglas Shaw, Ph.D.
  - b. December 16, 2016 for Steven Knapp, Ph.D.
  - c. January 5, 2017 for Lucky Westwood
2. A variety of financial planning documents and CBC historical financial statements, all bearing a production number with a CBC prefix
3. CBC's Motion for Temporary Restraining Order, and related exhibits

A more detailed listing of the records and their related production numbers that were available to Fulcrum is attached as Exhibit 4.

#### **IV. SUMMARY OF FULCRUM'S CONCLUSIONS**

Lost profit damages represent the present value of the difference between what should have happened (called the "but-for" world), and what actually has or will occur (called the "actual" world).

1. Absent the alleged wrongful conduct (the but-for world), UC would have shared access and ownership to the plant materials as of December 1, 2014, which would have allowed CBC to continue its development, patenting, and licensing efforts. CBC would have been able to patent the first cultivar in 2018 and commercialize this cultivar in 2019.
2. In the actual world, CBC implemented a similar level of effort, but faced delays having to start from scratch in a development cycle that typically lasts eight years. As a result, actual damages span over eight years.

Importantly, all of the calculations and conclusions contained in the rest of this section use, as their starting point, the dollar amount of royalties collected by UC. The use of dollars as the starting point in the analysis adds an element of imprecision (specifically, an understatement of the lost profits damages because:

1. The UC's rates have changed over time,<sup>7</sup> yet the use of currency amounts does not reflect directly the growth in the units involved.
2. The royalties are a mixture of licenses to the following categories, each of which have a different royalty rate:<sup>8</sup>
  - a. California – Currently \$8.00 per thousand plants
  - b. United States – Currently \$9.00 per thousand plants
  - c. Outside U.S. & Canada – Currently, \$16.50 per thousand plants

A more accurate calculation would consider the actual units shipped to each of these territories, applied to rates that CBC would use for each geography. I intend to perform such a calculation promptly using

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<sup>7</sup> UC STRAW2 000085284 – 7

<sup>8</sup> UC STRAW2 00075847 and UC STRAW2 000085284 – 7

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the same general methodology described below. The more accurate calculation predictably will increase the amount of lost profits, most likely by a significant amount.

Prior to the completion of the more accurate calculation described in the preceding paragraph, the present value of lost profits comparing the but-for and actual worlds is **at least \$20,450,000.**

Calculations of this amount are shown on Exhibit 1, and are explained as follows:

1. The historic licensing data for the nine cultivars listed in the "Background" (Section II) of this report are summarized. Six of these nine cultivars have not reached the end of their licensing capability. Fulcrum used a 21-year life for the more successful cultivars after considering the following:
  - a. As described in Section II, U.S. patents are effective for twenty years, with foreign licensing often lasting longer than this.
  - b. Some royalties occur while the patent is pending.
  - c. Reporting delays cause the receipt of royalties past the patent expiration date.
  - d. Multiple cultivars obtained royalties for more than 20 years. UC cultivars with long economic lives include Camarosa, Chandler, Oso Grande, Pajaro, Parker, Douglas, Selva, Fern, Hecker, and Aptos.<sup>9</sup>
2. To analyze the expected results of a lost cultivar, one needs to consider the entire licensing life of the cultivar. Additional future royalties (which are shaded in the last two pages of Exhibit 1) were estimated as follows:
  - a. Camino Real - Revenues have been relatively stable for the past eight years, with declines being modest. Post-2016 revenues are estimated to continue for the rest of the 21-year maximum period at \$300,000 each year.
  - b. Ventana - Revenues have been relatively stable for the past eight years, with only minor declines over the past six years. Post-2016 revenues are estimated to continue for the rest of the 21-year maximum period at \$500,000 each year.
  - c. Albion – Although recent revenues are less than the preceding four peak years, revenues remain large. Post-2016 revenues are estimated to continue for the remaining 21-year maximum period at \$1,300,000 for the next two years, \$1,000,000 for the next three years, and \$700,000 for the last three years.
  - d. Monterey – Revenues continue to increase. Post-2016 revenues are estimated to be 80% of the actual and estimated future revenues for Albion, beginning in Albion's year 10.
  - e. San Andreas - Post-2016 revenues are estimated to be equal to the actual and estimated future revenues for Albion, beginning in Albion's year 10.
  - f. Portola - Revenues continue to increase. Post-2016 revenues are estimated to be equal to the actual and estimated future revenues for Ventana, beginning in Ventana's year 10.

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<sup>9</sup> UC STRAW2 00058007, "total strawberry" tab

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3. As a reasonableness check on the above estimates for these six cultivars, Fulcrum made a second calculation of future expected revenues using an arithmetic average of royalties for whatever actual licensing period exists for that cultivar. The remaining portion of the 21-year maximum period use the arithmetic average royalty. Predictably, this calculation understates the future royalties because it gives equal weight to each of the first few licensing years, when the amounts involved are small and not representative of what will occur with an established cultivar. The results of this reasonableness check are shown on the last page of Exhibit 1, and support the reasonableness of the first calculation Fulcrum prepared.
4. As described in Section II, CBC's royalties will be at least 25% greater than what UC obtained.
5. The overall average licensing results using the two calculations describe above are shown on the third page of Exhibit 1 and are graphed in Exhibit 2. UC's past licensing history, as calculated above and on Exhibit 1, show that the average cultivar will generate \$12,840,000 for CBC in lifetime royalties.
6. Over the eight years that CBC will miss cultivars because of UC's conduct, CBC will miss \$102,720,000 of royalties (calculated as eight cultivars, at an average of \$12,840,000 for each cultivar).
7. The revenue streams described above are royalties, for which there are only immaterial incremental expenses. Expenses are estimated at \$1,500,000 annually under both the but-for and actual world. Because the level of expenses are the same, expenses need not be an explicit part of the calculation because one would be comparing identical amounts. Similarly, any misestimating of expenses does not alter the damage conclusion.
8. Inflation is expected to be 4% annually. A lower rate of inflation (which would be justified by historical inflation in the last several years) of approximately 2% to 3 % would increase damages.
9. A 15% compound annual discount rate is used. This is a reasonable discount rate for an established technology-based endeavor. The discount rate address both the time value of money and the business risk of this business. In this calculation a net discount rate is used; meaning, the 15% discount and 4% inflation are offset to equal a net 11%. This provides mathematical simplification, but otherwise is an identical mathematical result when compared to treating the discount rate and inflation separately. As would be typical when royalties are received throughout the year, a mid-year discounting convention is used.

The damages resulting from the discounting of eight years of missed cultivars is shown on the first page of Exhibit 1. For comparison, a similar calculation using the reasonableness-check revenues of \$11,670,000 per average cultivar is shown on the second page of Exhibit 1.

The use of a discount rate that includes business risk addresses the possible concern that the future projections to which the discount rate is applied is otherwise "speculative". The discount rate is primarily based on future business risks, and serves to reduce substantially the damages calculated. Because of this discount, the damages are reasonably certain because (i) all of the inputs have a historical basis, (ii) the methodology used is generally accepted and widely used, and (iii) substantially larger amounts could otherwise be presented, so the remaining amount represents a reasonable minimum. The total discount contained in this calculation is the difference between the \$102,720,000 of undiscounted royalties, and the \$20,450,000 of damages presented herein. The total discount is \$82,270,000, or 80 percent.

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**V. OTHER REQUIRED INFORMATION**

**A. QUALIFICATIONS FOR OFFERING OPINIONS**

Attached as Exhibit 3 is a copy of my curriculum vitae summarizing my education, experience and qualifications. Exhibit 3 also includes a listing of the cases in which I have testified as an expert at trial or by deposition within the preceding four years, and publications that I have authored in the last ten years.

**B. COMPENSATION**

Fulcrum is being paid at its normal hourly rates for the persons involved in the assignment. Our compensation is not contingent on the conclusions reached or ultimate resolution of the case. My personal hourly rate is currently \$625.

Very truly yours,  
Fulcrum Financial Inquiry LLP

By: 

David Nolte

# Exhibit 1



**California Berry Cultivars vs. University of California**  
**Lost Revenue Model**

Trend Analysis Projections

Net Discount Rate 11%

Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Cultivar#8	Subtotal	Present Value
2019	2 5	0.77	\$ -								\$ -	\$ -
2020	3 5	0.69	40,000	\$ -							40,000	27,761
2021	4 5	0.63	130,000	40,000	\$ -						170,000	106,291
2022	5 5	0.56	340,000	130,000	40,000	\$ -					510,000	287,272
2023	6 5	0.51	490,000	340,000	130,000	40,000	\$ -				1,000,000	507,459
2024	7 5	0.46	680,000	490,000	340,000	130,000	40,000	\$ -			1,680,000	768,045
2025	8 5	0.41	780,000	680,000	490,000	340,000	130,000	40,000	\$ -		2,460,000	1,013,187
2026	9 5	0.37	1,060,000	780,000	680,000	490,000	340,000	130,000	40,000	\$ -	3,520,000	1,306,094
2027	10 5	0.33	1,040,000	1,060,000	780,000	680,000	490,000	340,000	130,000	40,000	4,560,000	1,524,311
2028	11 5	0.30	1,120,000	1,040,000	1,060,000	780,000	680,000	490,000	340,000	130,000	5,640,000	1,698,497
2029	12 5	0.27	990,000	1,120,000	1,040,000	1,060,000	780,000	680,000	490,000	340,000	6,500,000	1,763,503
2030	13 5	0.24	830,000	990,000	1,120,000	1,040,000	1,060,000	780,000	680,000	490,000	6,990,000	1,708,508
2031	14 5	0.22	830,000	830,000	990,000	1,120,000	1,040,000	1,060,000	780,000	680,000	7,330,000	1,614,064
2032	15 5	0.20	710,000	830,000	830,000	990,000	1,120,000	1,040,000	1,060,000	780,000	7,360,000	1,460,063
2033	16 5	0.18	730,000	710,000	830,000	830,000	990,000	1,120,000	1,040,000	1,060,000	7,310,000	1,306,436
2034	17 5	0.16	580,000	730,000	710,000	830,000	830,000	990,000	1,120,000	1,040,000	6,830,000	1,099,686
2035	18 5	0.15	570,000	580,000	730,000	710,000	830,000	830,000	990,000	1,120,000	6,360,000	922,533
2036	19 5	0.13	570,000	570,000	580,000	730,000	710,000	830,000	830,000	990,000	5,810,000	759,238
2037	20 5	0.12	450,000	570,000	570,000	580,000	730,000	710,000	830,000	830,000	5,270,000	620,425
2038	21 5	0.11	450,000	450,000	570,000	570,000	580,000	730,000	710,000	830,000	4,890,000	518,639
2039	22 5	0.10	450,000	450,000	450,000	570,000	570,000	580,000	730,000	710,000	4,510,000	430,933
2040	23 5	0.09		450,000	450,000	450,000	570,000	570,000	580,000	730,000	3,800,000	327,110
2041	24 5	0.08			450,000	450,000	450,000	570,000	570,000	580,000	3,070,000	238,081
2042	25 5	0.07				450,000	450,000	450,000	570,000	570,000	2,490,000	173,966
2043	26 5	0.06					450,000	450,000	450,000	570,000	1,920,000	120,849
2044	27 5	0.06						450,000	450,000	450,000	1,350,000	76,551
2045	28 5	0.05							450,000	450,000	900,000	45,977
2046	29 5	0.05								450,000	450,000	20,710
											<u>\$ 102,720,000</u>	<u>\$ 20,446,189</u>

Notes:

[1] Uses mid-year convention

**California Berry Cultivars vs. University of California  
Lost Revenue Model**

Cultivar Average Projections

Net Discount Rate 11%

Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Cultivar#8	Subtotal	Present Value
2019	2 5	0.77	\$ -								\$ -	\$ -
2020	3 5	0.69	40,000	\$ -							40,000	27,761
2021	4 5	0.63	130,000	40,000	\$ -						170,000	106,291
2022	5 5	0.56	340,000	130,000	40,000	\$ -					510,000	287,272
2023	6 5	0.51	490,000	340,000	130,000	40,000	\$ -				1,000,000	507,459
2024	7 5	0.46	680,000	490,000	340,000	130,000	40,000	\$ -			1,680,000	768,045
2025	8 5	0.41	780,000	680,000	490,000	340,000	130,000	40,000	\$ -		2,460,000	1,013,187
2026	9 5	0.37	1,060,000	780,000	680,000	490,000	340,000	130,000	40,000	\$ -	3,520,000	1,306,094
2027	10 5	0.33	1,040,000	1,060,000	780,000	680,000	490,000	340,000	130,000	40,000	4,560,000	1,524,311
2028	11 5	0.30	740,000	1,040,000	1,060,000	780,000	680,000	490,000	340,000	130,000	5,260,000	1,584,059
2029	12 5	0.27	690,000	740,000	1,040,000	1,060,000	780,000	680,000	490,000	340,000	5,820,000	1,579,013
2030	13 5	0.24	620,000	690,000	740,000	1,040,000	1,060,000	780,000	680,000	490,000	6,100,000	1,490,972
2031	14 5	0.22	620,000	620,000	690,000	740,000	1,040,000	1,060,000	780,000	680,000	6,230,000	1,371,844
2032	15 5	0.20	570,000	620,000	620,000	690,000	740,000	1,040,000	1,060,000	780,000	6,120,000	1,214,074
2033	16 5	0.18	570,000	570,000	620,000	620,000	690,000	740,000	1,040,000	1,060,000	5,910,000	1,056,230
2034	17 5	0.16	550,000	570,000	570,000	620,000	620,000	690,000	740,000	1,040,000	5,400,000	869,444
2035	18 5	0.15	550,000	550,000	570,000	570,000	620,000	620,000	690,000	740,000	4,910,000	712,207
2036	19 5	0.13	550,000	550,000	550,000	570,000	570,000	620,000	620,000	690,000	4,720,000	616,799
2037	20 5	0.12	550,000	550,000	550,000	550,000	570,000	570,000	620,000	620,000	4,580,000	539,193
2038	21 5	0.11	550,000	550,000	550,000	550,000	550,000	570,000	570,000	620,000	4,510,000	478,335
2039	22 5	0.10	550,000	550,000	550,000	550,000	550,000	550,000	570,000	570,000	4,440,000	424,244
2040	23 5	0.09		550,000	550,000	550,000	550,000	550,000	550,000	570,000	3,870,000	333,136
2041	24 5	0.08			550,000	550,000	550,000	550,000	550,000	550,000	3,300,000	255,918
2042	25 5	0.07				550,000	550,000	550,000	550,000	550,000	2,750,000	192,131
2043	26 5	0.06					550,000	550,000	550,000	550,000	2,200,000	138,473
2044	27 5	0.06						550,000	550,000	550,000	1,650,000	93,563
2045	28 5	0.05							550,000	550,000	1,100,000	56,194
2046	29 5	0.05								550,000	550,000	25,312
											<u>\$ 93,360,000</u>	<u>\$ 18,571,562</u>

Notes:

[1] Uses mid-year convention

**California Berry Cultivars vs. University of California  
Lifetime Royalty Calculation**

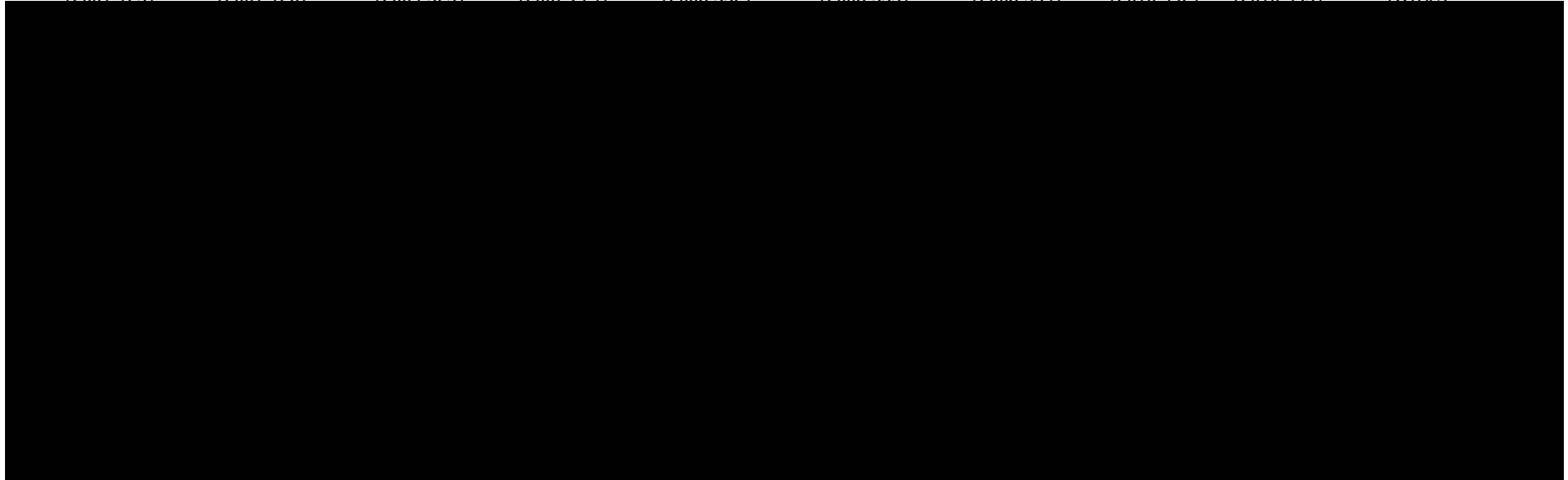
	Cultivar Average			Trend Projections	
	%	Projected Royalty		%	Projected Royalty
Average Royalties		\$ 11,677,489			\$ 12,866,198
1st year	0%	-	0%	-	-
	0%	40,000	0%	40,000	40,000
	1%	130,000	1%	130,000	130,000
	3%	340,000	3%	340,000	340,000
5th	4%	490,000	4%	490,000	490,000
	6%	680,000	5%	680,000	680,000
	7%	780,000	6%	780,000	780,000
	9%	1,060,000	8%	1,060,000	1,060,000
	9%	1,040,000	8%	1,040,000	1,040,000
10th	6%	740,000	9%	1,120,000	1,120,000
	6%	690,000	8%	990,000	990,000
	5%	620,000	6%	830,000	830,000
	5%	620,000	6%	830,000	830,000
	5%	570,000	6%	710,000	710,000
15th	5%	570,000	6%	730,000	730,000
	5%	550,000	4%	580,000	580,000
	5%	550,000	4%	570,000	570,000
	5%	550,000	4%	570,000	570,000
	5%	550,000	4%	450,000	450,000
20th	5%	550,000	4%	450,000	450,000
	5%	550,000	4%	450,000	450,000
(rounded)		<u>\$ 11,670,000</u>			<u>\$ 12,840,000</u>

**California Berry Cultivars vs. University of California**  
**UCDavis Strawberry Royalties**

Trend Analysis Projections

Average Royalty \$ 10,292,958  
 CBC Improvement 25%  
 CBC Expected Royalties 12,866,198

Camino Real (2001-125)	Ventana (2001-126)	Albion (2004-323)	Palomar (2007-274)	Monterey (2008-332)	San Andreas (2008-333)	Portola (2008-334)	Benicia (2010-492)	Mojave (2010-493)	TOTALS
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100%

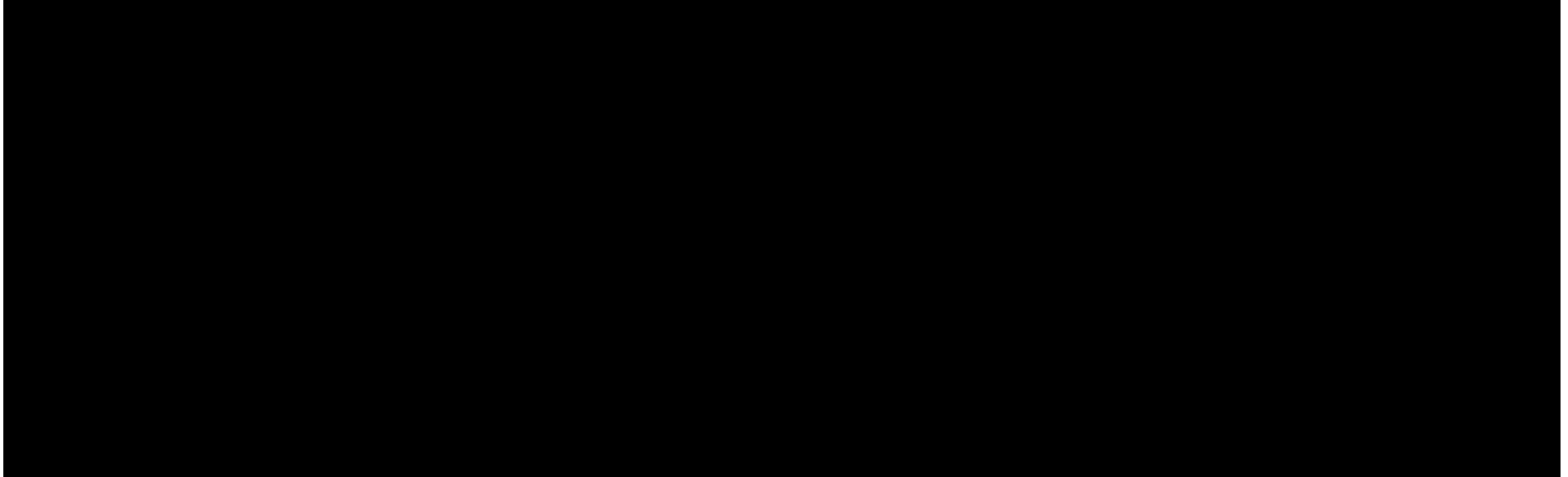
Source: UC\_STRAW2\_00075847  
 CONTAINS ATTORNEYS EYES ONLY INFORMATION  
 Values in green are projections

**California Berry Cultivars vs. University of California****UCDavis Strawberry Royalties**

Cultivar Average Projections

Average Royalty \$ 9,341,991  
 CBC Improvement 25%  
 CBC Expected Royalties 11,677,489

Camino Real (2001-125)	Ventana (2001-126)	Albion (2004-323)	Palomar (2007-274)	Monterey (2008-332)	San Andreas (2008-333)	Portola (2008-334)	Benicia (2010-492)	Mojave (2010-493)	TOTALS
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100%

Source: UC\_STRAW2\_00075847

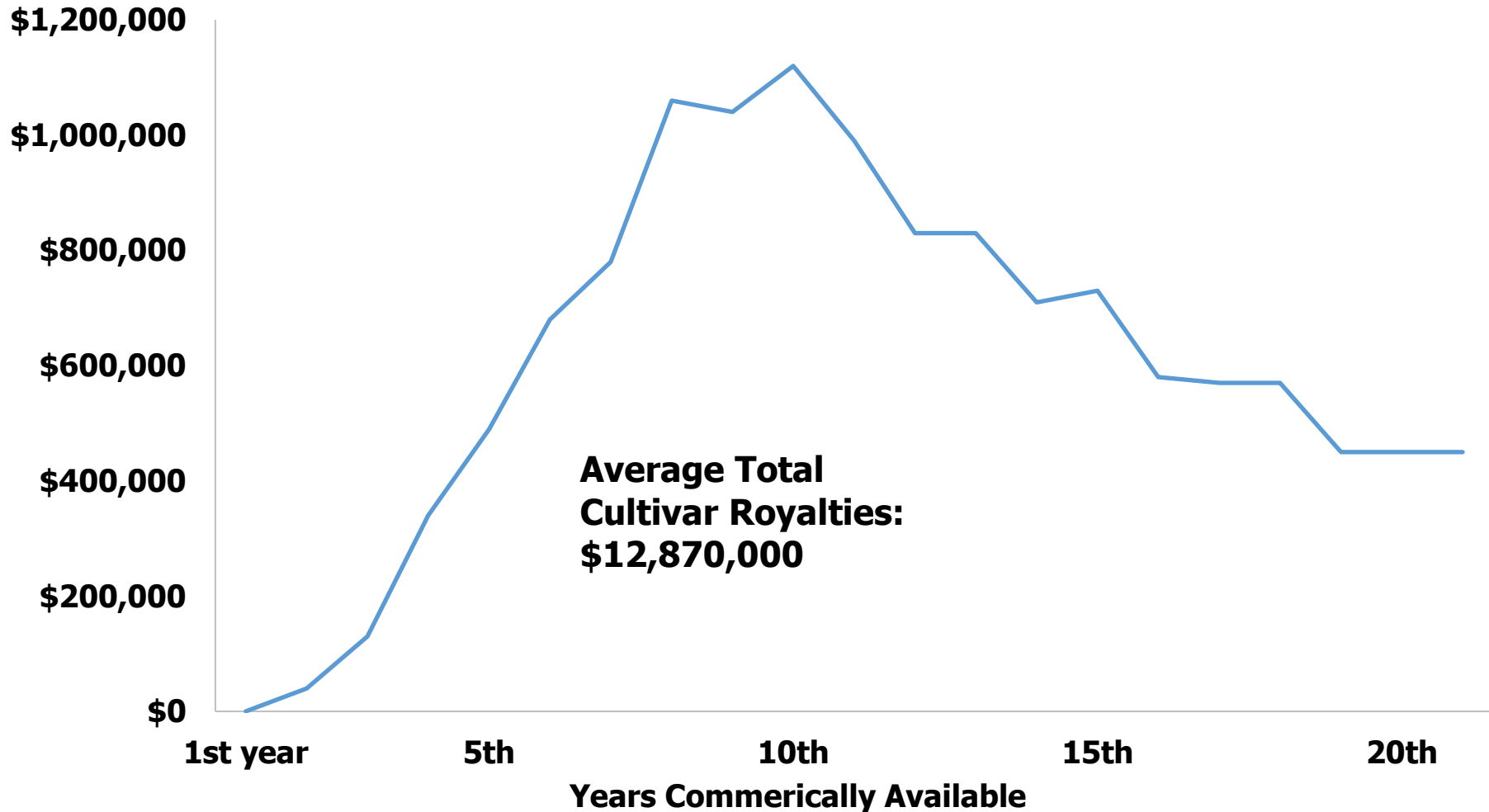
CONTAINS ATTORNEYS EYES ONLY INFORMATION

Values in green are projections

## **Exhibit 2**

## **CBC's average expected royalties for each new cultivar average \$12.9 million**

### **Annual Cultivar Royalties**

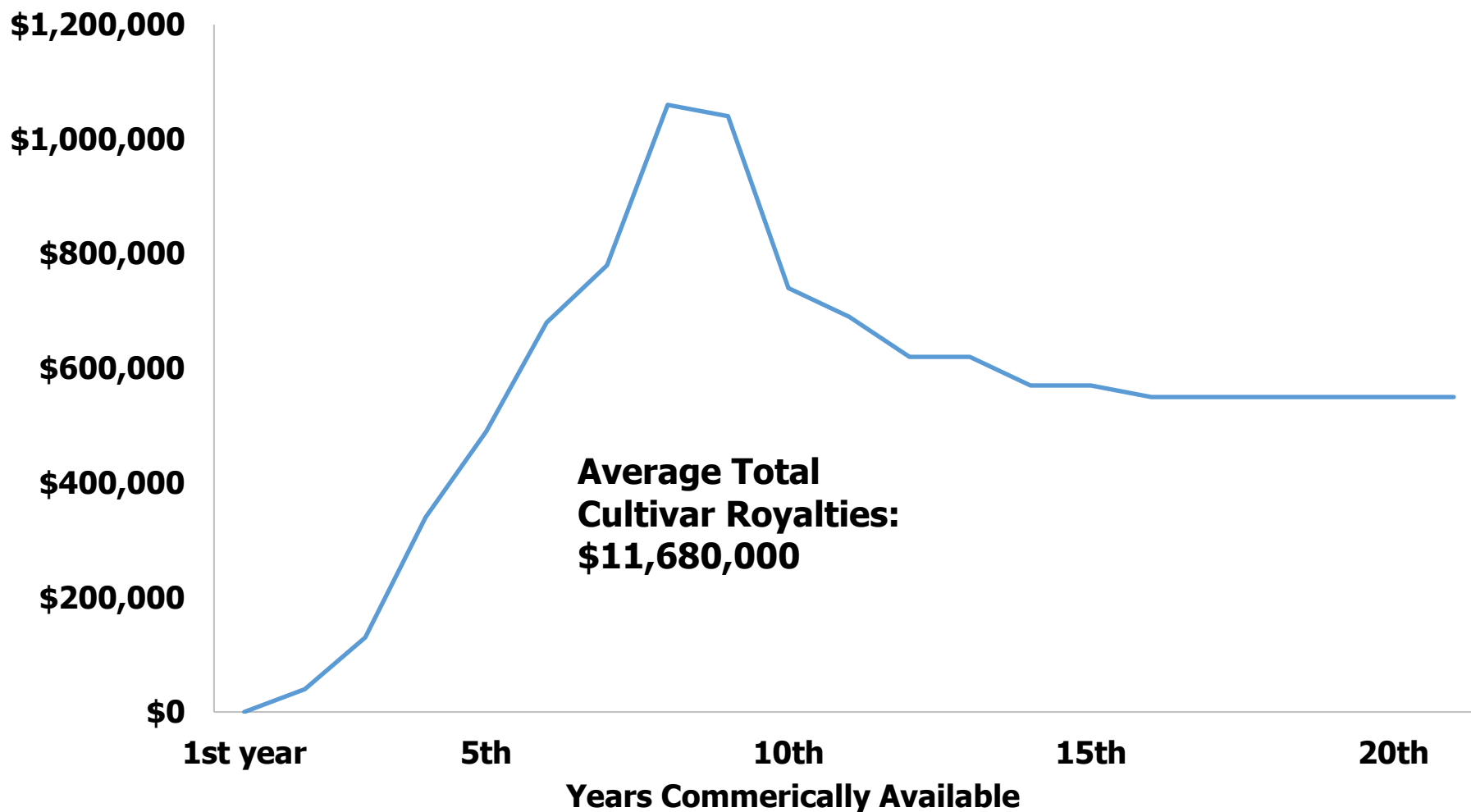


**Source: UC Davis royalties from existing cultivars, with 25% increase and trend projections**



## **CBC's average expected royalties for each new cultivar average \$11.7 million**

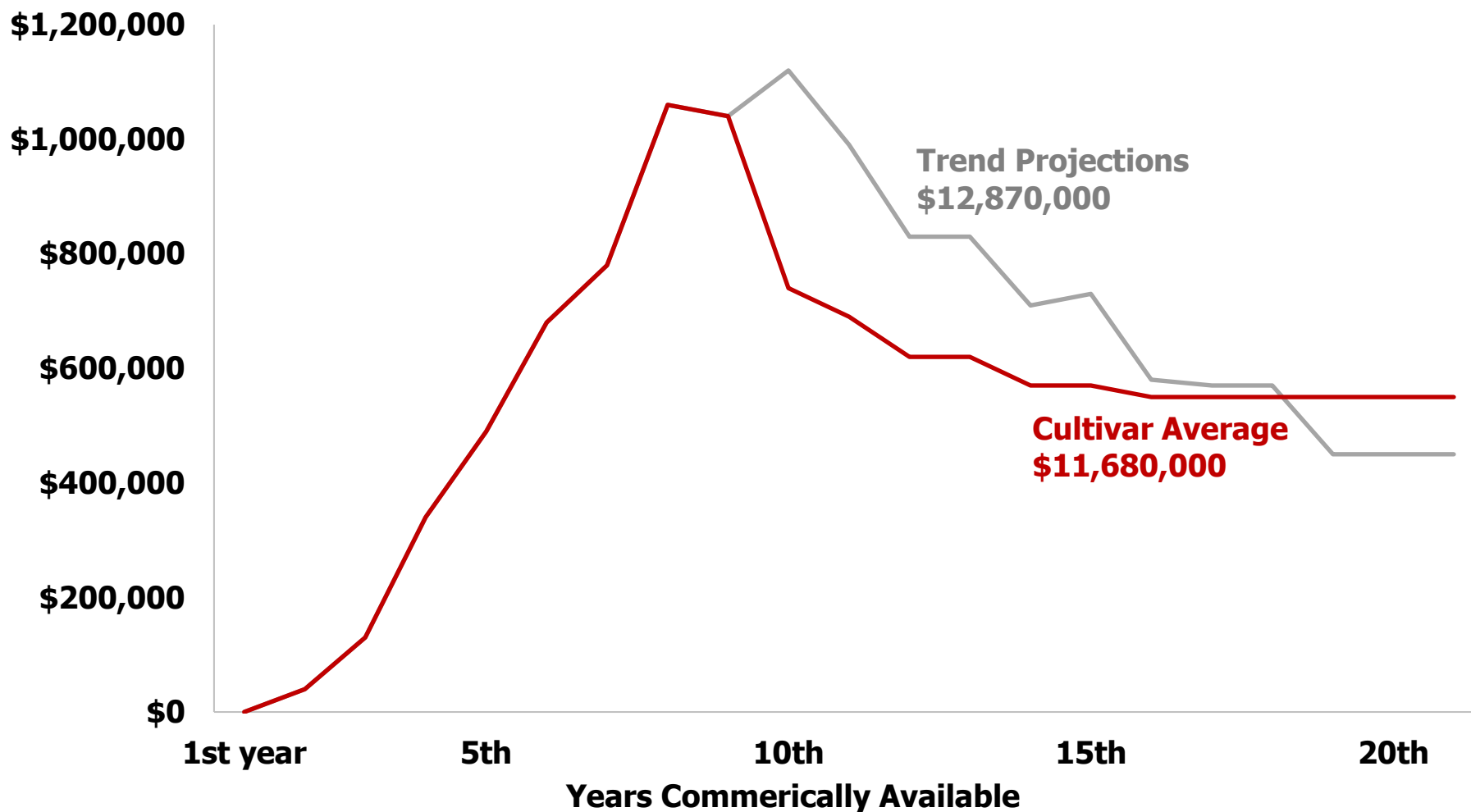
### **Annual Cultivar Royalties**



**Source: UC Davis royalties from existing cultivars with 25% increase and average projections**

## CBC's average expected royalties for each new cultivar with different projections

### Annual Cultivar Royalties



Source: UC Davis royalties from existing cultivars, with 25% increase and various projections

# **Exhibit 3**

**DAVID NOLTE**

Fulcrum Financial Inquiry LLP  
213-787-4111  
dnolte@fulcrum.com

**SUMMARY**

With over 35 years of experience, Mr. Nolte has worked with a broad range of firms/industries in both litigation and non-litigation settings. Mr. Nolte's client work focuses primarily on valuation of businesses and intangible business assets, economic studies, royalty and fraud auditing, and litigation-related financial analysis.

**LICENSES AND CERTIFICATIONS**

Certified Public Accountant (CPA), 1979 to present

Accredited Senior Appraiser (ASA), 1995 to present

Certified Management Accountant (CMA), 1992 to present

**EDUCATION**

MBA, California State University, Los Angeles, 1982

BA, Whittier College (graduated first in his class), 1977

**EMPLOYMENT**

Fulcrum Financial Inquiry LLP (May 2002 to Present)

Founded firm. Actively serves as the leader for numerous client engagements, as well as remaining responsible for Fulcrum's overall operations and direction. See [www.fulcrum.com](http://www.fulcrum.com) for additional information.

Andersen LLP (1977 to 2002)

Responsible for the Southern California forensic accounting and damage analysis practice of this international accounting and consulting firm. This practice was one of the largest such groups in the western United States. In addition to leading the local group, served on the firm-wide steering committees for the litigation consulting and the bankruptcy & troubled company consulting service lines.

Prior to working as a full-time consultant, performed audits for large publicly traded and private companies, including serving as the overall audit partner for such services.

Other Employment

Adjunct Professor at Whittier College (1981 to 1986) - Taught upper division accounting and auditing classes

Darling Wold & Agee (1975 to 1977) Performed tax, business management, and accounting work at this CPA firm.

**LISTING OF TRIAL AND DEPOSITION TESTIMONIES IN THE LAST FOUR YEARS**

In the following listing, each case is listed only once, with the date of the most recent testimony shown. For example, in a matter in which both deposition and trial testimony occurred, the date of the trial testimony is shown.

	<b><u>LAW FIRM</u></b> <b><u>2013</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
1	Vista IP Law Group LLP	Subo Automation Inc., et al vs. Propack Processing & Packaging Systems, Inc.	1/7/13	SA CV 10- 1946 AG	U.S. District Court, Central District Of California
2	Steiner & Associates	VS Media, Inc. Vs. Pivital Payments	1/9/13	SC109948	Superior Court Of California, County of Los Angeles
3	Stetler, Duffy & Rotert, Ltd.	Smart Marketing Group, Inc. vs. Publications International. Ltd.	1/17/13	04 C 0146	United States District Court, Northern District of Illinois
4	Flynn, Delich & Wise LLP	Mitsui O.S.K. Lines, Ltd vs. Seamaster Logistics et al.	2/1/13	C 11-02861 SC	U.S. District Court, Northern District of California
5	Weingarten Brown LLP	Crestview Service Center, Inc. vs. Graver Family Trust	2/13/13	1220044494	JAMS Arbitration
6	Garrett & Tully	Gary Iskowitz et al. vs. Georges Marciano et al.	2/22/13	BC384493 & BC385790	Superior Court Of California, County of Los Angeles
7	Silverman, Sclar Shin, & Byrne LLP	Malovani & Murray vs. Harvest Productions, et al.	3/8/13	SACV 11- 00787 AG	U.S. District Court, Central District of California
8	Morris, Sullivan & Lemkul, LLP	Rancho California Owners Association vs. Outdoor Resorts Rancho California, Inc. et al.	4/2/13	RIC469533	Superior Court Of California, County of Riverside
9	Reback, McAndrews & Kjar, Warford & Stockalper, LLP	Christophe & Danielle Schatteman vs. Salvador Brau.	4/29/13	BC462768	Superior Court Of California, County of Los Angeles
10	Poindexter & Doutre	Estate of Elsinore Gilliland	5/20/13	P517929	Superior Court of California, County of Los Angeles
11	Theodora Oringher PC	Healthcare Partners Medical Group et al. vs. Citizens Choice Health Plan, Inc.	6/6/13	1210030411	JAMS Arbitration
12	Crowell & Mooring LLP	Ralphs Grocery Company vs. Midtown Shopping Center Associates	6/11/13	BC493630	Superior Court of California, County of Los Angeles
13	Procopio, Cory, Hargreaves & Savitch LLP	Kaneka Corporation vs. Uno & Company, Ltd. et al.	6/20/13	3:10-CV-1430- P	United States District Court, Northern District of Texas
14	Kirtland & Packard LLP	POM Wonderful LLC Marketing and Sales Practices Litigation	9/3/13	ML 10-02199 DDP	U.S. District Court, Central District of California

	<b><u>LAW FIRM</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
15	Parr Brown Gee & Loveless	Derek Smith vs. Diamond Contract Services, Inc.	9/4/13	120047102	JAMS Arbitration
16	Pircher, Nichols & Meeks	Rapid Rack Industries, Inc. vs. China Export & Credit Corp et al.	9/11/13	CV11-07785 ODW	U.S. District Court, Central District of California
	<b>2013</b> (continued)				
17	Callahan & Blaine	Festus Dada vs. KM Strategic Management	9/18/13	1220043943	JAMS Arbitration
18	Troy & Gould PC	LJB Bishop Enterprises, Inc. et al vs. Seaport Marina Hotel et al.	9/27/13	NC057896	Superior Court of California, County of Los Angeles

	<b><u>LAW FIRM</u></b> <b><u>2014</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
1	Fredrikson & Byron, P.A.	Lerman vs. My Pillow, Inc.	1/6/14	SACV 12-00916 AG	U.S. District Court, Central District of California
2	Phillips Law Partners, LLP	Hot Shot Picture Cars vs. CHP Enterprises et al.	2/13/14	11-4546-PLC	ADR Services, Inc.
3	Lobb & Cliff, LLP	Shawn Bennett vs. Filter Recycling Services, Inc. et al.	3/5/14	RIC 429614	Superior Court of California, County of Riverside
4	McLeod, Moscarino, Witham & Flynn LLP	MedAssets Net Revenue System vs. Downey Regional Medical Center	3/12/14	CV13-01936 ODW	U.S. District Court, Central District of California
5	Law Offices of Michael Jason Lee	Mining Technologies International, Inc. vs. Versailles Investments, LLC	3/28/14	SC114519	Superior Court of California, County of Los Angeles
6	Paul Hastings	Altamura, et al. vs. L'Oreal, USA, Inc., et al.	4/4/14	CV 11-1067 CAS	U.S. District Court, Central District of California
7	Dickson Wright; Moss & Barnett	Western Competitive Solutions, Inc. et al. vs. Roshka Heyman & Dewulf, LLP et al.	5/1/14	CV2012-50944	Superior Court of the State of Arizona, County of Maricopa
8	Liner LLP	In re: Horizon Organic Milk Plus DHA Omega-3 Marketing and Sales Practice Litigation	5/2/14	1:12-MD-02324	U.S. District Court, Southern District of Florida
9	Lauson & Tarver LLP	Gravity Defyer vs. Under Armour, et al.	5/30/14	2:13-CV-01842-JAK	U.S. District Court, Central District of California
10	Cadwalader Wickersham & Taft LLP	Ferolito et al. vs Arizona Beverages USA LLC	6/25/14	12-004058	Supreme Court of the State of New York, Nassau County
11	Jones Day	Cobb vs. BSH Home Appliances Corporation	9/9/14	SA CIV-10-00711 DOC	U.S. District Court, Central District of California
12	Raskin Anderson Law	Westmoore Management et al. vs. Weinberg et al.	10/23/14	SACV13-00132 AG	U.S. District Court, Central District of California
13	Moss & Barnett	James Zazzali, asTrustee for DBSI Estate vs. Eide Bailly LLP	11/19/14	1:12-cv-00349-MJP	U.S. District Court, District of Ohio
14	Jenner & Block LLP	Fox Broadcasting Company et al. vs. Dish Network, LLC et al.	12/18/14	CV12-04529GHK	U.S. District Court, Central District of California

	<b><u>LAW FIRM</u></b> <b><u>2015</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
1	Lewis Brisbois Bisgaard & Smith	Prince v. Invensure	1/28/15	30-2013- 00638387- CU-BC-CJC	Superior Court of California, County of Orange
2	Allen Matkins Leck Gamble Mallory & Natsis LLP	Corbin Northridge, L.P. vs. HBC Solutions, Inc. et al.	2/5/15	2:14-CV- 02714-RGK	U.S. District Court, Central District of California
3	Swanson Law Office	Wood River Capital Resources, LLC re: AREI II (Four related cases in a Judicial Coordination Proceeding	2/10/15	4730	Superior Court of California, County of Los Angeles
4	Garrett & Tully, P.C.	Conquest International & Gillham vs. Hinton Kreditor Gronroos LLP et al.	2/19/15	BC 492003	Superior Court of California, County of Los Angeles
5	Silverman, Sclar Shin, & Byrne LLP	Macro-Z-Technology Company vs. LarKor et al., and related matters	3/4/15	30-2012- 00590479- CU-BC-CJC	Superior Court of California, County of Orange
6	Gibbs, Giden, Locher, Turner, & Senet	Layton Construction Co., Inc. vs. Universal Health Services	3/9/15	MC022600	Superior Court of California, County of Los Angeles
7	Minyard Morris LLP	Schofield vs. Cook	3/10/15	13D006203	Superior Court of California, County of Orange
8	Garrett & Tully	Stinchfield Financial Services, Inc. et al. vs. Stewart Title Guarantee Company, et al.	3/12/15	CV 098107	Superior Court of California, County of San Luis Obispo
9	Sheppard Mullin Richter & Hampton LLP	United States Fidelity & Guarantee Company vs. Rexford Properties, LLC	3/18/15	BC 499060	Superior Court of California, County of Los Angeles
10	Kaplan Zeena LLP	Couch vs. Morgan Stanley & Co. LLC et al.	4/30/15	1:14-CV- 00010-LJO	U.S. District Court, Central District of California
11	Kupferstein Manuel & Quinto LLP	Brady vs. Grendene S.A. et al	5/1/15	3:12-CV- 00604-GPC	U.S. District Court, Southern District of California
12	Moss & Barnett	Douglas Kelly, as Chapter 11 trustee of Petters Company, Inc. and other consolidated entities vs. Eide Bailly LLP	5/5/15	65 Y 00008 12	American Arbitration Association
13	Tycko & Zavareei LLP	Dapeer vs. Neutrogena Corp.	5/21/15	1:14-CV- 22113-MGC	U.S. District Court, Southern District Of Florida
14	Greenberg Traurig	Estate of Stanley Diller & related trusts	6/23/15	BP136585 & BP140257	Superior Court of California, County of Los Angeles



	<b><u>LAW FIRM</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
15	Greenberg Traurig	24 Hour Fitness	8/19/15	BP136585 & BP140257	Superior Court of California, County of Los Angeles
16	Hogan Lovells US LLP	Trebesch vs. Fall Line Capital et al.	9/3/15	01-14-001-0482	AAA Arbitration
17	Jones Day	In re: Ceasars Entertainment Operating Company, Inc., Debtor	10/17/15	15-03193 (ABG)	United States Bankruptcy Court, Northern District of Illinois
18	Gartenberg Gelfand Hayton LLP	Van Wagenen vs. Wells Fargo Advisors, LLC	11/18/15	not available	FINRA arbitration, Los Angeles
19	Gerard Fox Law P.C.	Min Productions Pte. Ltd. vs. FireForge Inc., and Cross-complaint	11/24/15	8:14-cv-00941-MMM	U.S. District Court, Central District of California
	<b><u>LAW FIRM 2016</u></b>	<b><u>NAMES OF PARTIES</u></b>	<b><u>DATE</u></b>	<b><u>CASE NO.</u></b>	<b><u>COURT/JURISDICTION</u></b>
1	Carlton Fields Jordan Burt, LLP	Xzeres Corporation vs. CMI Technologies	2/25/16	2:15-cv-00805-RGK	U.S. District Court, Central District of California
2	Sedwick LLP	YUM! Brands, Inc. vs. XL Syndicate, et al.	5/26/15	(none available)	Arbitration in New York
3	United States Attorney	Aeros Aeronautical Systems Corp. vs. United States	6/10/16	CV 2:15-1712 PSG	U.S. District Court, Central District of California
4	Jones Day	Operation Technology, Inc. vs. CYME International et al.	6/21/16	8:14-cv-00999 JLS	U.S. District Court, Central District of California
5	Weintraub Tobin Chediak Coleman Grodin	Healthcare Solutions Insurance Agency, Inc. vs. Health Net of California et al.	7/7/16	122Q 049089	JAMS Arbitration
6	Lewis Brisbois Bisgaard & Smith	Ozuna vs. Tristar Transload	10/31/16	CIVDS1415 289	Superior Court of California, County of San Bernardino
7	Garrett & Tully	PNY Technologies vs. Miller Kaplan Arase & Co LLP	11/9/16	15-cv-01728-MMC	U.S. District Court, Northern District of California
8	Kurzman Eisenberg Corbin & Lever, LLP	McKenna et al. vs. GEC energy Holdings et al., and related Cross Complaints	11/17/16	11371-VCP	Delaware Chancery Court
9	Hartnett Law Group	In re: Lettice Family trusts and subtrusts	11/30/16	0-2015-00819750-PR-TR-CJC	Superior Court of California, Orange County
10	Cozen O'Connor	KM Industrial, Inc. vs. Paramount Petroleum corporation, and Cross Complaint	12/15/16	S-1500-CV-280815	Superior Court of California, Kern County

**LISTING OF PUBLICATIONS AUTHORED  
IN THE LAST TEN YEARS**

*How to Succeed with Expert Witnesses*, published in *The Survival Guide for New Attorneys in California* by the Los Angeles Lawyer and the Los Angeles County Bar Association Barristers, Fall 2005. Republished Fall 2006. Republished Fall 2011

# **Exhibit 4**

Reference Number	Description
CBC_DS_00018819	2014 Plant Material Left at UC
CBC_DS_00018820	2013 Inventory List
CBC_DS_00018847	2014 Plant Material Left at UC
CBC_DS_00019105	Cultivar Roundtable Notes
CBC_DS_00019129	CBC Financial Projections
CBC_DS_00020644	Email from Patrick Nielson to Jacob Appelsmith re: Letter and enclosures from Chief Counsel Appelsmith
CBC_DS_00024426	Full Year Budget Estimate for 2014-15
CBC_DS_00025370	2015 Full Year Budget Estimate
CBC00000042	California Berry Cultivars Income Statement for the 5 Months Ending May 31, 2015
CBC00000075	California Berry Cultivars, LLC Operating Agreement
CBC00000389	California Berry Cultivars, LLC Balance Sheet as of March 31, 2016
CBC00000403	California Berry Cultivars, LLC Balance Sheet as of May 25, 2016
CBC00001336	California Berry Cultivars, LLC Balance Sheet as of April 30, 2016
CBC00001342	Doug's Budget for Transition Cultivars
CBC00001816	California Berry Cultivars, LLC Executive Summary & Business Plan
CBC00001849	Strawberry Inc. 10-Year Forecast
CBC00002256	2014 Seedling Field Costs
CBC00002330	California Berry Cultivars, LLC Balance Sheet as of December 31, 2014
CBC00002349	California Berry Cultivars, LLC Balance Sheet as of May 31, 2015
CBC00002460, CBC00002487	California Berry Cultivars, LLC Balance Sheet as of November 30, 2015
CBC00003499	Copy of CBC Budget 2014-2015
CBC00004087	California Berry Cultivars, LLC Balance Sheet as of December 9, 2015
CBC00004132	California Berry Cultivars, LLC Statement of Cash Flows January 1 – December 9, 2016
CBC00004200	California Berry Cultivars, LLC Balance Sheet Prev Year Comparison as of May 31, 2016
CBC00008333	2016 Cash Flow Overview
CBC00010451	2015 Budget R1
CBC00013903	December 2014 CBC Financials
CBC00013913	August 2015 CBC Financials
CBC00013925	May 2015 CBC Financials
CBC00013929	November 2015 CBC Financials
CBC00014110	Copy of CBC Budget 2014-2015
CBC00014138	Copy of Copy of CBC Budget 2014-2015
ECF No. 104	University Third Amended Crossclaim
ECF No. 19	Ex Parte Motion for TRO and OSC
ECF No. 19-1	Ex. 1 to Ex Parte Motion for TRO and OSC
ECF No. 19-2	Ex. 2 to Ex Parte Motion for TRO and OSC
ECF No. 19-3	Ex. 3 to Ex Parte Motion for TRO and OSC
ECF No. 19-4	Ex. 4 to Ex Parte Motion for TRO and OSC
ECF No. 19-5	Ex. 5 to Ex Parte Motion for TRO and OSC
ECF No. 19-6	Ex. 6 to Ex Parte Motion for TRO and OSC
ECF No. 2-2	Verified Complaint

Reference Number	Description
Kawamura Ex. 165.9	Exhibit 165.9 to the CBC 30(b)(6) Deposition of A.G. Kawamura - CBC Financials (Budgets, Income Statement, Balance Sheet, Cash Flow)
UC_STRAW2_000077360	California State Auditor Report 2014-121 on the University of California, Davis
UC_STRAW2_000081751	UC Davis - Plant Sciences Department - Strawberry Program Revenue and Expenses
UC_STRAW2_000085284	UC Davis InnovationAccess Assessment of UC Davis Strawberry Program Royalty Rates
UC_STRAW2_000091127	Non-California Discount Royalty Program Revenue Timeline
UC_STRAW2_00038636	Email Michael Carriere to Mike Fahner
UC_STRAW2_00040893	Notice re: Ex-California Royalty Rates
UC_STRAW2_00045149	California Nursery Plants Used in California
UC_STRAW2_00050075	UC Davis Commitment to Strawberry Program – Fiscal 2012
UC_STRAW2_00058007	Strawberry Sales Data
UC_STRAW2_00073415	McGee Letter to Murai Regarding Change in Royalty Rates
UC_STRAW2_00075842 and UC_STRAW2_00075843 (Excel version)	Exhibit 102 - Strawberry Inventor Shares - Shaw
UC_STRAW2_00075844	Strawberry Varieties Income per Fiscal Year
UC_STRAW2_00075847	Strawberry Varieties Income per Fiscal Year
UC_STRAW2_00077123	December 2014 University Internal Audit Report - Strawberry Breeding Project
UC_STRAW2_00077360	June 2015 California State Audit Report - UCD Strawberry Breeding Program
UC_STRAW2B1_00027513	Background for a Royalty Rate Increase on UC strawberry Cultivars Grown in California - May 2007
Westwood 11/29/2016 Depo.	2016-11-29 Lucky Westwood Transcript - Full
Westwood Ex. 1	Exhibit 1 - Operating Agreement
Westwood Ex. 2	Exhibit 2 - Email String Containing 5-9-16 Email from K VandenLangenberg to L. Westwood
Westwood Ex. 3	Exhibit 3 - UCD Forecast
Westwood Ex. 4	Exhibit 4 - 10-Year Sales Forecast by Plant Count
Westwood Ex. 5	Exhibit 5 - 6-30-14 Services Agreement by and between IS and CBC
Westwood Ex. 6	Exhibit 6 - 6-30-14 Services Agreement by and between IS and CBC
Westwood Ex. 7	Exhibit 7 - 1-22-16 Limited Liability Company Authorization Resolution
Westwood Ex. 8	Exhibit 8 - Confirmation of Transaction Notice
Westwood Ex. 9	Exhibit 9 - CBC Responses to UC 1st Set of Rogs 1-3
Westwood Ex. 10	Exhibit 10 - Spreadsheet Representing Size of Market and Potential Revenues
Westwood Ex. 11	Exhibit 11 - Talking Points for Conversation with Partners re Revenue Models
Westwood Ex. 12	Exhibit 12 - Email String Containing 2-12-15 Email from Westwood to L Ponce re Question of Litigation Against UC
Westwood Ex. 13	Exhibit 13 - Email String Containing 5-7-15 Email from L Westwood to AG Kawamura, et al re Oxnard Greenhouse
Westwood Ex. 14	Exhibit 14 - Email String Containing 4-13-15 Email from AG Kawamura to L Westwood re Management Decisions
Westwood Ex. 15	Exhibit 15 - 12-11-15 Email from K VandenLangenberg to D Shaw and L Westwood re Slides

Reference Number	Description
Westwood Ex. 16	Exhibit 16 - Email String Containing 12-7-15 Email from M Kawamura to B Ito re Strawberry Meeting
Westwood Ex. 17	Exhibit 17 - Email String Containing 1-20-16 Email L Ponce to AG Kawamural re Scheduled Santa Maria Field Day
Westwood Ex. 18	Exhibit 18 - Email String Containing 7-28-16 Email from L Westwood to VandenLangenberg re Possible Agenda Item
Westwood Ex. 19	Exhibit 19 - Email String Containing 1-26-16 Email from Westwood to VandenLangenberg re CBC Budget 2014-15
Westwood Ex. 20	Exhibit 20 - 1-26-16 Letter from J Appelsmith Responding to D Shaw 11-17-15 Email to Knapp
Westwood Ex. 21	Exhibit 21 Email String Containing 8-31-14 Email from Westwood to Moncovich re Demur
Westwood 1/5/2017 Depo. (30(b)(6))	2017-01-05 Westwood Full Transcript
Westwood Ex. 397	Exhibit 397 Email from G Lippetz to M Chivvis Dated 1-4-2017 re EXT CBC 30 b 6 Topics
Westwood Ex. 398	Exhibit 398 University 30 b 6 Notice of Deposition of CBC Dated 11-7-2016
Westwood Ex. 399	Exhibit 399 Operating Agreement Dated 1-1-2014
Westwood Ex. 400	Exhibit 400 Operating Agreement Signature Pages
Westwood Ex. 401	Exhibit 401 Limited Liability Company Authorization Resolution Dated 1-22-2016
Westwood Ex. 402	Exhibit 402 Email from J Simmons to J Cano Dated 4-23-2013 re Plant Breeding Adventure
Westwood Ex. 403	Exhibit 403 Email from J Simmons to J Cano Dated 4-23-2013 re Plant Breeding Adventure - Cover Sheet
Westwood Ex. 404	Exhibit 404 Email from D Shaw to K Larson Dated 12-11-2013 re File Attaching KL CBC Cross 2014
Westwood Ex. 405	Exhibit 405 Southern Elite Diallel 2014
Westwood Ex. 406	Exhibit 406 Email from K VandenLangenberg to J Hansen and D Shaw Dated 2-18-2015 re Task List
Westwood Ex. 407	Exhibit 407 Chart re Pedigree
Shaw Depo.	2016-12-08 Doug Shaw Transcript - Full
Shaw Ex. 52	Exhibit 52 - SF Elite Diallel 2014 - Breeding Information and Trade Secrets
Shaw Ex. 53	Exhibit 53 - Northern and Southern Elite Diallel 2016 Breeding and Trade Secrets Information
Shaw Ex. 54	Exhibit 54 - Northern and Southern Diallel 2016 and Northern and Southern Factorial 2016
Shaw Ex. 100	Exhibit 100 - CBC Shaw and Kirk 2nd Supplemental Responses to UC Rogs 1 4-6
Shaw Ex. 101	Exhibit 101 - Short Narrative The Demise of the UC Davis Strawberry Program
Shaw Ex. 102	Exhibit 102 - Strawberry Inventor Shares
Shaw Ex. 103	Exhibit 103 - 5-3-1994 - USPP 8708
Shaw Ex. 104	Exhibit 104 - 2-25-1986 State Oath of Allegiance for D Shaw
Shaw Ex. 105	Exhibit 105 - Fax from N Hirsch to D Shaw Dated 8-2-99 re Attached Ltr of 7-2-1999 from R Nelson to Shaw
Shaw Ex. 106	Exhibit 106 - Memo from D Shaw to C Voelker Dated 8-3-1999 re Nelson Letter

Reference Number	Description
Shaw Ex. 107	Exhibit 107 - Letter Dated 9-28-1999 from B Duffet and R Huntington re Protection of New Plant Material
Shaw Ex. 108	Exhibit 108 - Email from M Carriere to A Bennett Dated 9-6-2000 re Burns Doane Opinion 9-6
Shaw Ex. 109	Exhibit 109 Email from D Shaw to A Hakim-Elahi Dated 3-27-2000 re Research Memo
Shaw Ex. 110	Exhibit 110 - Email from N Van Alfen to D Shaw Dated 9-3-2009 re Strawberry Growers
Shaw Ex. 111	Exhibit 111 Email from N Van Alfen to S Drown et al Dated 2-10-2010 re Strawberry Guidelines
Shaw Ex. 112	Exhibit 112 - Email from D Shaw to C Van Kessel Dated 3-16-2011 re Germplasm Releases
Shaw Ex. 113	Exhibit 113 - Letter from L Lewis to Dean Gardner et al Dated 4-27-1990 re Communication 28
Shaw Ex. 114	Exhibit 114 - UC Policy on Release of Sexually-Asexually Propogated Plant Materials January 1991
Shaw Ex. 115	Exhibit 115 - ANR Administrative Handbook Section 485 - Commercial Release of Protected Plant Materials 6-1-2007
Shaw Ex. 116	Exhibit 116 - Email from D Shaw to C Van Kessel Dated 11-1-2011 re Strawberry Program
Shaw Ex. 117	Exhibit 117 - Email from D Shaw to C Van Kessel Dated 4-5-2012 re Strawberries
Shaw Ex. 118	Exhibit 118 - Letter from T DeJong to C Van Kessel Dated 12-18-2013 re Handling of Strawberry Core Germplasm
Shaw Ex. 119	Exhibit 119 - Letter from H Dillard to C Van Kessel Dated 3-26-2014 re Release of the 180 Germplasm Lines
Shaw Ex. 120	Exhibit 120 - Email from D Shaw to J Appelsmith of 6-13-2014 re Licensing of Core Strawberry Genetic Materials
Shaw Ex. 121	Exhibit 121 - Email from D Shaw to M Carriere Dated 6-13-2014 re US Plant Patent Application Assignment
Shaw Ex. 122	Exhibit 122 - Email from D Shaw to Dean Dillard Dated 11-7-2014 re 2013 Selections
Shaw Ex. 123	Exhibit 123 - Email from D Shaw to C Van Kessel et al Dated 11-6-2014 re Research and Materials Expectations
Shaw Ex. 124	Exhibit 124 - Email from Knapp to Shaw of 11-17-2015 re Confidential Strawberry Breeding Program Pedigrees and Documentation
Shaw Ex. 125	Exhibit 125 - Email from D Shaw to C Voelker et al Dated 6-1-2013 re IA Document and Meeting
Shaw Ex. 126	Exhibit 126 - Email from D McGee to D Shaw and K Larson Dated 6-17-2014 re US Plant Patent Application Assignment
Shaw Ex. 127	Exhibit 127 - Email from J Cano Pecci to AG Kawamura Dated 11-21-2014 re Spain Trip Larson
Shaw Ex. 128	Exhibit 128 - Email from D Shaw to J Cano Dated 12-9-2014 re 2015 CBC Cross List
Shaw Ex. 129	Exhibit 129 - Chart - Northern Elite Diallel 2015

Reference Number	Description
Shaw Ex. 130	Exhibit 130 - Email from D Shaw to J Cano Pecci and L Ponce Dated 11-24-2014 re Spain Trip Larson
Shaw Ex. 131	Exhibit 131 - Email from D Shaw to J Cano Dated 4-13-2015 re CBC Germplasm
Shaw Ex. 132	Exhibit 132 - Germplasm Chart
Shaw Ex. 133	Exhibit 133 - Google Map of Spain Dated 11-17-2016
Shaw Ex. 134	Exhibit 134 - Email from J Cano to D Shaw and C Manolo Dated 3-20-2015 re CBC Spanish Trip
Shaw Ex. 135	Exhibit 135 - Visiting Program Kirk Larson for Tuesday 9 December
Shaw Ex. 136	Exhibit 136 - Email from K VandenLangenberg to D Sinova and M Pecci re Seedling Recommendation
Shaw Ex. 137	Exhibit 137 - General University Policy Regarding Academic Appointees - Rev 7-1-14
Shaw Ex. 138	Exhibit 138 - Report of Category I and II Compensated Outside Professional Activities
Knapp Depo.	2016-12-16 Steven Knapp Transcript Full
Knapp Ex. 182A	EXHIBIT-182A University Responses and Objs to CBC Notice of Deposition of University Dated 12-2-2016
Knapp Ex. 182B	EXHIBIT-182B Email from M Chivvis to G Lippetz Dated 12-15-2016 re University Responses-Objs to CBC Notice of Deposition
Knapp Ex. 182C	EXHIBIT-182C University Responses-Objs to CBC Notice of Deposition of University Dated 12-2-2016
Knapp Ex. 183	EXHIBIT-183 - Binder - contains Exhibits 183.1 to 183.6
Knapp Ex. 183	EXHIBIT-183 - Binder - contains Exhibits 183.7 to 183.8
Knapp Ex. 184A	EXHIBIT-184A Curriculum Vitae for S Knapp
Knapp Ex. 184B	EXHIBIT-184B Curriculum Vitae for S Knapp
Knapp Ex. 184C	EXHIBIT-184C S Knapp Publications
Knapp Ex. 185	EXHIBIT-185 Chart Labeled Strawberry Crosses 6-15-2015
Knapp Ex. 186	EXHIBIT-186 WEO Nursery Map - 2016
Knapp Ex. 187	EXHIBIT-187 US PP27034 P3 Dated 8-9-2016
Knapp Ex. 188	EXHIBIT-188 Plot Maps
Knapp Ex. 189	EXHIBIT-189 Chart Entitled YTD Production - Crates-Acre
Knapp Ex. 190	EXHIBIT-190 Chart Entitled Weekly Production Crates-Acre
Knapp Ex. 191	EXHIBIT-191 Email from M Delany to H Dillard Dated 8-5-2015 re Confidential - Missing Cultivars Tested with Growers
Knapp Ex. 192	EXHIBIT-192 UC Strawberry Breeding Program Report by S Knapp and G Cole
Knapp Ex. 193	EXHIBIT-193 FPS Transfer 2016

# **Exhibit 2**



CONFIDENTIAL

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

-----  
 CALIFORNIA BERRY )  
 CULTIVARS, LLC, )  
 Plaintiff, )

vs. ) No. 3:16-cv-02477-VC

THE REGENTS OF THE )  
 UNIVERSITY OF )  
 CALIFORNIA, a )  
 corporation, )  
 Defendant. )

-----  
 THE REGENTS OF THE )  
 UNIVERSITY OF )  
 CALIFORNIA, a )  
 corporation, )

Cross-Complainant, )

vs. )

CALIFORNIA BERRY )  
 CULTIVARS, LLC, DOUGLAS )  
 SHAW, and KIRK LARSON, )

Cross-Defendants. )

-----  
 )

CONFIDENTIAL TRANSCRIPT

VIDEOTAPED DEPOSITION OF DAVID NOLTE  
 Los Angeles, California  
 Tuesday, March 14, 2017

Reported by:

LORI M. BARKLEY

CSR No. 6426

Job No. 2556145

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## CONFIDENTIAL

1 Does that sound about the time that you were 09:13:53  
2 hired? 09:13:54

3 A. Something in that vicinity, yes. 09:14:00

4 Q. Okay. Can you tell me how many hours you 09:14:01  
5 personally spent drafting your first report on -- 09:14:06  
6 that issued on January 21st, 2017? 09:14:09

7 A. I didn't keep track of just the drafting 09:14:20  
8 time, but something in the vicinity of two days. 09:14:24

9 Q. And are you being compensated at \$625 an 09:14:37  
10 hour for your time? 09:14:41

11 A. Yes. 09:14:41

12 Q. Have you had any prior experience on valuing 09:14:43  
13 intellectual property relating to agricultural 09:14:48  
14 products? 09:14:51

15 MS. SMITH: Objection, vague. 09:15:05

16 THE WITNESS: Nothing comes to mind off the 09:15:06  
17 top of my head. 09:15:07

18 BY MR. OVERSON: 09:15:09

19 Q. Have you had any experience in doing damages 09:15:09  
20 calculations relating to any agricultural products or 09:15:15  
21 issues? 09:15:18

22 MS. SMITH: Objection, vague. 09:15:19

23 THE WITNESS: You said damage calculations? 09:15:20

24 BY MR. OVERSON: 09:15:21

25 Q. Yes. 09:15:21

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## CONFIDENTIAL

1 materials available to which CBC contends it was 09:43:38  
2 entitled, and this report calculates the impact of an 09:43:40  
3 eight-year delay. 09:43:46  
4 BY MR. OVERSON: 09:43:50  
5 Q. Where did you get the idea that it would be 09:43:50  
6 an eight-year delay? 09:43:51  
7 A. I was told that in the discussions that I 09:43:54  
8 had which defined this assignment. 09:44:02  
9 Q. And they were told that they, CBC, could 09:44:08  
10 have been able to release a cultivar in 2019 with 09:44:10  
11 access to the materials, true? 09:44:12  
12 A. Correct. 09:44:14  
13 Q. And as a result of not having access to the 09:44:14  
14 materials, there would be a further eight-year delay 09:44:19  
15 from that to 2027, true? 09:44:22  
16 A. That is what I was told. 09:44:26  
17 Q. So this is just math, but that means that it 09:44:26  
18 took from 2014 to 2027 to release a cultivar for CBC 09:44:31  
19 without the materials. 09:44:37  
20 That's what you're assuming in your report, 09:44:37  
21 right? 09:44:39  
22 MS. SMITH: Objection, misstates the 09:44:39  
23 witness's testimony and report. 09:44:40  
24 THE WITNESS: It says there's an eight-year 09:44:48  
25 delay. I believe the eight years would start from 09:44:55

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## CONFIDENTIAL

1           A.    Doesn't have to be inflation.   But it would   09:58:55  
2   be growth, a good portion of the growth could be   09:58:59  
3   inflation, but not necessarily all of it.   09:59:03  
4           Q.    Okay.   What's the 11 percent in this table?   09:59:04  
5   What does it represent to you?   09:59:06  
6           A.    It's the net discount rate.   09:59:07  
7           Q.    Okay.   And how did you calculate -- I   09:59:09  
8   understand.   We'll talk a little more about how you   09:59:11  
9   get to 15 percent, but how did you get from   09:59:14  
10   15 percent to 11 percent?   09:59:16  
11           A.    I have a 4 percent long-term growth rate.   09:59:17  
12           Q.    Okay.   And it says:   Years of delay here on   09:59:20  
13   your chart, four years, and then you have columns   09:59:23  
14   below; and then on cultivar 1, you're showing income   09:59:28  
15   coming in in 2015.   09:59:32  
16                Do you see that?   09:59:34  
17           A.    Correct.   09:59:35  
18           Q.    So under the scenario where the U.C.   09:59:37  
19   provides all the materials to CBC, CBC doesn't   09:59:46  
20   commercialize anything until 2019, correct?   09:59:50  
21           A.    That is the input that I was given by   09:59:54  
22   Dr. Shaw, yes.   09:59:59  
23           Q.    So it -- how -- why are you showing any   09:59:59  
24   income in a damage calculation for 2015 through 2018,   10:00:05  
25   when even if they received all the materials, they   10:00:12

CONFIDENTIAL

1 wouldn't have had any income till 2019? 10:00:14

2 A. Because I'm showing the impact of a smaller 10:00:19

3 amount of delay. And this particular thing is based 10:00:21

4 on present valuing, based on the date of Dr. -- you 10:00:25

5 know, there may be -- hold on a minute. 10:00:41

6 You know, it may be that the confusion is 10:01:01

7 caused by the year nomenclature, although as I told 10:01:02

8 you before, it doesn't impact the calculations 10:01:06

9 themselves. This calculation is based on a four-year 10:01:08

10 delay, and putting aside the years, which are just a 10:01:13

11 label, the four-year calculation is as shown on this 10:01:16

12 page. 10:01:21

13 And I'll -- and I can give some additional 10:01:22

14 thought in terms of the labeling, but again, it won't 10:01:25

15 change the numbers. 10:01:27

16 Q. So you agree with me in terms of the 10:01:29

17 damages, there should be no lost revenue or lost 10:01:34

18 profit in a but-for scenario until 2019 -- 10:01:41

19 MS. SMITH: Objection, misstates the 10:01:46

20 witness's testimony. 10:01:48

21 BY MR. OVERSON: 10:01:49

22 Q. -- right? 10:01:49

23 A. Under my initial calculations that is what I 10:01:50

24 was told, yes. I was told that discounting should 10:01:53

25 start from 2019, which is what I've done. 10:01:56

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CONFIDENTIAL

1 Q. And not just your initial calculations, in 10:01:58  
2 fact, in your damages calculations you've assumed 10:02:01  
3 there's no income until 2019, right? 10:02:03

4 A. Yes. The calculations in 2000- -- in my 10:02:10  
5 first report were based on that. 10:02:16

6 Q. Okay. But then in Exhibit 8 here when 10:02:21  
7 you're showing 2015, I think you're trying to tell me 10:02:24  
8 that this is just a label and it makes no difference 10:02:30  
9 whether it said 2019 or 2015 there. 10:02:32

10 Is that what you're saying? 10:02:34

11 A. I'll give some additional thought to the 10:02:34  
12 label on -- on the years, which is -- it's clear from 10:02:37  
13 your questioning it's causing some confusion. But it 10:02:41  
14 does not -- I'm sorry, I'm funny, I -- you know, 10:02:45  
15 maybe you should have a videotape on you, too. 10:02:48

16 Q. I'm not confused. It's just wrong. 10:02:51  
17 There -- 2015 is wrong, isn't it, sir? It's just a 10:02:53  
18 mistake? 10:02:56

19 MS. SMITH: Objection, argumentative. 10:02:56

20 THE WITNESS: I indicated that I will 10:02:58  
21 revisit the labeling, but this alternate calculation 10:03:02  
22 shown in table 2 is -- illustrates the impact of 10:03:08  
23 changing the number of years. And the years of four, 10:03:13  
24 five, six, seven, and eight are correct. 10:03:21

25

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1 BY MR. OVERSON: 10:03:29

2 Q. What do you mean when they say "the years 10:03:29

3 four, five, six, seven, eight are correct"? 10:03:31

4 A. Well, there's -- there's two things shown in 10:03:33

5 that column, and I was reading to you part, or call 10:03:35

6 it half, of the label in table 2, and it's clear from 10:03:41

7 your questioning that I should revisit the labels of 10:03:46

8 the number of years, but -- but what this calculation 10:03:51

9 does is addresses the impact of reducing the -- how 10:03:58

10 long it takes to develop a cultivar and how many 10:04:04

11 cultivars are missing. 10:04:07

12 Q. Can I ask you to turn back to Exhibit 1, 10:04:10

13 which is your first report, and I'm looking at page 3 10:04:48

14 of 8 of Exhibit 1 and specifically at paragraph 2, 10:04:50

15 which has the entry, first sentence (as read): 10:04:57

16 The following nine cultivars were 10:05:00

17 developed by Drs. Shaw and Larson 10:05:02

18 and have at least five years of 10:05:05

19 licensing history. 10:05:07

20 And then there's a listing of nine names of 10:05:12

21 cultivars. Where did you get these cultivars from? 10:05:14

22 A. I note a U.C. document that identifies 10:05:21

23 these. The timing or identification of cultivars in 10:05:29

24 which only Dr. Shaw and Larson were involved were 10:05:37

25 provided by Dr. Shaw. 10:05:41

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1 the bottom half of page 6. 10:15:04

2 Q. Okay. So I'm at -- I'm with you, I think, 10:15:09

3 and at paragraph 2A, let's take, for example, Camino 10:15:18

4 Real, which is the first one, it says (as read): 10:15:22

5 Revenues have been relatively 10:15:25

6 stable for the past eight years with 10:15:27

7 declines being modest. Post 2016 10:15:29

8 revenues are estimated to continue 10:15:32

9 for the rest of the 21-year maximum 10:15:35

10 period at 300,000 each year. 10:15:38

11 And for the next one, Ventana, you had 10:15:46

12 500,000 each year, and it listed -- I see what you're 10:15:49

13 saying, it lists it for each one. 10:15:51

14 So how did you go about deciding that 10:15:53

15 300,000 was the right number for Camino Real going 10:15:55

16 forward? 10:15:58

17 A. It was based on the thought process that is 10:15:58

18 described in the section that I just referred you to. 10:16:01

19 Q. Did you do any kind of mathematical analysis 10:16:10

20 to reach 300,000 as the right amount to project for 10:16:12

21 the last five years for Camino Real? 10:16:17

22 A. It was based on what I describe as a trend 10:16:23

23 and the numbers that preceded it. If you're asking 10:16:30

24 me whether it was a, you know, purely mathematical 10:16:35

25 process, the answer is no, but it was based on the 10:16:38

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## CONFIDENTIAL

1 thinking that is described in my report. 10:16:42

2 Q. So you would agree with me that in general, 10:16:56

3 looking at the 21-year period that the numbers, 10:16:58

4 towards the end, tend to decline on these royalty 10:17:02

5 streams, true? 10:17:06

6 A. Generally, that's correct. 10:17:09

7 Q. But at this one, you kept it at 300,000 for 10:17:10

8 the last five years. Is there a reason you did that 10:17:18

9 as opposed to having it decline over the last five 10:17:21

10 years? 10:17:23

11 A. Look, if someone wants to say that they want 10:17:28

12 to change the last year from 300,000 to 275,000, it's 10:17:30

13 fine, I suspect it will get lost in rounding. But in 10:17:35

14 any event, I -- I -- this was my best estimate based 10:17:40

15 on the information I had. 10:17:46

16 Q. And what information did you have about 10:17:49

17 Camino Real apart from just the royalty stream from 10:17:57

18 years 1 through 16? 10:17:59

19 A. That is the information I was looking at. 10:18:02

20 Q. Just that -- just those numbers? 10:18:04

21 A. Correct. I mean, I was mindful of what 10:18:06

22 generally was happening to these strawberries. I 10:18:08

23 mean, I had the entire document and looked at them. 10:18:11

24 I noted that I was cutting this off at 21 years, and 10:18:15

25 in fact, there were royalty streams that were beyond 10:18:22

CONFIDENTIAL

1 royalties, and I'm not sure there should be any 11:44:35  
2 royalties deducted. But in any event, I haven't 11:44:37  
3 deducted any royalties. 11:44:39  
4 BY MR. OVERSON: 11:44:45  
5 Q. In your report, you assumed that Drs. Shaw 11:44:46  
6 and Larson and CBC had a royalty free license to the 11:44:48  
7 materials, true? 11:44:55  
8 MS. SMITH: Objection, misstates the 11:44:57  
9 witness's report. 11:44:58  
10 THE WITNESS: I made no such assumption. 11:45:01  
11 BY MR. OVERSON: 11:45:03  
12 Q. Well, let's look at page 2 of your original 11:45:07  
13 report. B(1) says (as read): 11:45:09  
14 Upon retirement Drs. Shaw and 11:45:16  
15 Larson had a non-exclusive right 11:45:19  
16 license to use the results of their 11:45:21  
17 research plant materials and related 11:45:22  
18 information, collectively the 11:45:24  
19 materials. 11:45:25  
20 Did you write that? 11:45:26  
21 A. Well, if you're asking me whether it's in my 11:45:28  
22 report, sure, it's in my report. But -- but no, I 11:45:30  
23 really didn't write it. This is not a conclusion I'm 11:45:34  
24 reaching. 11:45:38  
25 This is a summary that I've prepared based 11:45:41

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## CONFIDENTIAL

1       were projections, were done on a variety-by-variety       13:16:27  
2       or cultivar-by-cultivar basis.       13:16:31

3           Q.     And they were based on a judgment that you       13:16:34  
4       made based on the data that you had as opposed to       13:16:35  
5       some kind of mathematical formula, true?       13:16:38

6           A.     Well, if you're asking me whether I had any       13:16:42  
7       mathematical formula that I slavishly followed, the       13:16:43  
8       answer is no, I didn't have any such mathematical       13:16:47  
9       formula.       13:16:50

10           I did have data that I looked at, observed,       13:16:50  
11       and evaluated in making -- putting the numbers on the       13:16:53  
12       page that you see in my report.       13:16:56

13           Q.     Can you tell me how many times have you       13:17:18  
14       spoken with Dr. Shaw?       13:17:20

15           A.     Once.       13:17:24

16           Q.     Okay.   And when was that?       13:17:24

17           A.     It was in the week prior to my January 21       13:17:35  
18       report.       13:17:40

19           Q.     And how many times have you talked to       13:17:41  
20       Dr. Larson?       13:17:43

21           A.     I don't believe I've ever spoken with him.       13:17:43

22           Q.     And how many times have you spoken with       13:17:46  
23       Mr. Westwood?       13:17:48

24           A.     Once.       13:17:49

25           Q.     And when was that?       13:17:51

## CONFIDENTIAL

1           A.     In the same conversation I -- in which I was     13:17:51  
2     talking with Dr. Shaw.   13:17:54

3           Q.     Have you spoken with anybody else from CBC?     13:17:57  
4     I'm excluding lawyers.   13:18:02

5           A.     The short answer is no. The more careful,     13:18:12  
6     longer answer is if there were some others on this     13:18:16  
7     phone call that I was mentioning to you, I could not     13:18:20  
8     identify their additional names, or even if there     13:18:24  
9     were any such additional people.                                 13:18:27

10          Q.     Okay. And on that one phone call, do you     13:18:29  
11     recall how long it lasted?   13:18:33

12          A.     It was pretty long, you know, it could have     13:18:43  
13     gone a couple hours. I don't know specifically, but     13:18:47  
14     I don't want to tell you it was -- it was not a short     13:18:49  
15     phone call. It was a longer phone call.                         13:18:51

16          Q.     Less than two hours -- more than an hour,     13:18:54  
17     less than two hours?   13:18:57

18          A.     Again, I really don't know the specific     13:18:59  
19     time, but, you know, I -- I -- you're probably --     13:19:02  
20     that's probably right. If someone said it went two     13:19:09  
21     hours and five minutes I wouldn't argue with them.     13:19:12  
22     I'm sure it went more than an hour.                             13:19:14

23          Q.     Do you recall that we were talking about     13:19:16  
24     2014 unit sales and you thought they were not     13:19:44  
25     complete, and what did you do in your calculation in     13:19:48

## CONFIDENTIAL

1 Q. Mr. Nolte, if the jury concludes that CBC 13:31:59  
2 had access to the U.C. strawberry plant materials 13:32:03  
3 from December 1st, 2014 forward, then your analysis 13:32:08  
4 does not make sense, does it? 13:32:14

5 A. Okay. Your hypothetical is 100 percent of 13:32:17  
6 the materials have been at CBC all along and the 13:32:19  
7 entire factual premise of CBC's claim is a boldfaced 13:32:25  
8 lie, and if that is your hypothetical, sure, you 13:32:30  
9 don't need my damage calculation 'cause the jury 13:32:33  
10 wouldn't -- wouldn't believe anything that CBC is 13:32:35  
11 saying 'cause you just, in your hypothetical, said 13:32:38  
12 that it's a big lie. I'm -- 13:32:41

13 MR. OVERSON: I have no further questions. 13:32:43  
14 Thank you. 13:32:44

15 MS. SMITH: Can we take a short break and 13:32:50  
16 then we'll redirect. 13:32:52

17 MR. OVERSON: Sure. 13:32:53

18 VIDEO OPERATOR: Time is 1:32. We're off 13:32:54  
19 the record. 13:32:56

20 13:52:08

21 (Recess taken.)

22 13:52:25

23 VIDEO OPERATOR: Time is 1:52. We're on the 13:52:27  
24 record. 13:52:31

25

CONFIDENTIAL

1 STATE OF CALIFORNIA ) ss.

2 COUNTY OF LOS ANGELES )

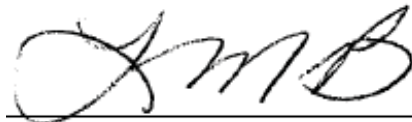
3  
4 I, Lori M. Barkley, CSR No. 6426, do hereby  
5 certify:

6 That the foregoing deposition testimony  
7 taken before me at the time and place therein set  
8 forth and at which time the witness was administered  
9 the oath;

10 That the testimony of the witness and all  
11 objections made by counsel at the time of the  
12 examination were recorded stenographically by me, and  
13 were thereafter transcribed under my direction and  
14 supervision, and that the foregoing pages contain a  
15 full, true and accurate record of all proceedings and  
16 testimony to the best of my skill and ability.

17 I further certify that I am neither counsel  
18 for any party to said action, nor am I related to any  
19 party to said action, nor am I in any way interested  
20 in the outcome thereof.

21 IN WITNESS WHEREOF, I have subscribed my  
22 name this 28th day of March, 2017.

23  
24 

25 LORI M. BARKLEY, CSR No. 6426

# Exhibit 3



PAGES 1 - 41

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE VINCE CHHABRIA

CALIFORNIA BERRY CULTIVARS, LLC,	)	
	)	
PLAINTIFF,	)	
	)	
V.	)	NO. 16-CV-02477 VC
	)	
THE REGENTS OF THE UNIVERSITY OF	)	SAN FRANCISCO, CALIFORNIA
CALIFORNIA,	)	THURSDAY
DEFENDANT.	)	SEPTEMBER 22, 2016
_____	)	
	)	
THE REGENTS OF THE UNIVERSITY OF	)	
CALIFORNIA,	)	
	)	
CROSS-COMPLAINANT,	)	
	)	
V.	)	
	)	
CALIFORNIA BERRY CULTIVARS,	)	
DOUGLAS SHAW, AND KIRK LARSON,	)	
	)	
CROSS-DEFENDANTS.	)	
_____	)	

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**  
**RECORDING 11:55 A.M. - 12:44 P.M. & 12:44 P.M. - 12:46 P.M.**

(APPEARANCES ON FOLLOWING PAGE)

**TRANSCRIBED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR**  
**RETIRED OFFICIAL COURT REPORTER, USDC**

1           **MR. LIPPETZ:** NO OBJECTION.

2           BUT I HAVE TO CLARIFY ONE THING.

3           A LOT OF THEIR PREMISED SUSPICIONS ABOUT WHAT HASN'T  
4       BEEN PROVIDED STEMS FROM A FALSE PREMISE THAT HAS NEVER BEEN  
5       SHOWN ANY EVIDENCE TO SUPPORT, WHICH IS THAT OUR CLIENTS SENT  
6       MATERIAL OVERSEAS TO BE USED FOR THIS CROSSING. WE'VE STATED  
7       UP AND DOWN IN MEET AND CONFERS, ET CETERA, THAT NEVER  
8       HAPPENED.

9           AND SO A LOT OF THIS, WELL, WHERE THERE'S THE  
10      INFORMATION ABOUT WHERE THEY GOT THE MATERIAL, WHERE'S THE  
11      INFORMATION ABOUT WHEN YOU SENT IT TO THEM, WE DID NOT SEND IT  
12      TO THEM. MY CLIENTS DID NOT SEND THE MATERIAL OVERSEAS TO BE  
13      USED FOR CROSSING.

14           AND SO THESE, QUOTE/UNQUOTE, ALLEGED GAPS IN OUR  
15      INFORMATION --

16           **THE COURT:** WHO SENT THE MATERIALS OVERSEAS?

17           **MR. LIPPETZ:** WE DON'T KNOW, AND THIS IS AGAIN WHAT  
18      WE'RE TRYING TO SAY. THEY JUST DON'T BELIEVE IT.

19           OUR CLIENT -- AND THIS IS THE STORY THAT WILL COME  
20      OUT AS THIS CASE PROCEEDS -- CONTRACTED WITH AN ENTITY IN  
21      SPAIN -- THERE WERE A COUPLE OF ENTITIES, BUT INTERNATIONAL  
22      SEMILLAS IS THE ENTITY WE HAVE BEEN TALKING ABOUT -- TO TAKE  
23      PATENTED VARIETY 1, MAYBE A U.C. VARIETY, MAYBE A UNIVERSITY OF  
24      FLORIDA VARIETY, OR SOME OTHER PATENTED VARIETY, MATE IT WITH  
25      PATENTED VARIETY NUMBER 2; CREATE STRAWBERRIES, DISTILL THE

1 SEEDS FROM THOSE STRAWBERRIES, AND SEND US THE SEEDS IN THE  
2 U.S. FOR A NEW VARIETY, NOT AN ASEXUALLY-REPRODUCED VARIETY,  
3 BUT A NEW GENOTYPE TO BE PLANTED IN THE U.C. AND USED BY CBC IN  
4 ITS BUSINESS.

5 **THE COURT:** AND THEIR CONTENTION WITH RESPECT TO  
6 PATENT INFRINGEMENT IS THAT THAT DELIVERING OF THE PLANT FOR --

7 **MR. LIPPETZ:** OF THE SEEDS TO US YOU MEAN?

8 **THE COURT:** NO, NO, NO. YOUR INITIAL -- YOUR ALLEGED  
9 INITIAL DELIVERY OF THE PLANT.

10 **MR. LIPPETZ:** BUT THERE WAS NO INITIAL DELIVERY OF  
11 THE PLANT. THE PEOPLE IN SPAIN HAVE BEEN LICENSED -- SORRY.

12 **THE COURT:** WAIT. WHAT DID YOU JUST SAY YOU  
13 CONTRACTED WITH THEM TO DO?

14 **MR. LIPPETZ:** TO TAKE MATERIAL FROM A SOURCE WE DO  
15 NOT KNOW THE SOURCE OF, TO TELL THEM, LOOK, PUT YOUR HANDS ON  
16 PATENTED VARIETY NUMBER 1 SOMEHOW; WE DON'T KNOW WHAT IT IS,  
17 BUT DO IT LAWFULLY. PUT YOUR HANDS ON PATENTED VARIETY  
18 NUMBER 2, MAKE A CROSS OF THAT AND SEND US THE RESULT.

19 **THE COURT:** THE MORE I HEAR ABOUT THE CASE --

20 **MR. LIPPETZ:** YEAH.

21 **THE COURT:** -- THE MORE I LEARN ABOUT THIS, THE  
22 SKETCHIER YOUR CLIENTS ARE SEEMING.

23 **MR. LIPPETZ:** BUT, YOUR HONOR. LET ME TELL YOU  
24 SOMETHING --

25 **THE COURT:** EVERY TIME I READ SOMETHING NEW, EVERY

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF  
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE  
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE  
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE  
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,  
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN  
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT  
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE  
ACTION.



JOAN MARIE COLUMBINI

SEPTEMBER 27, 2016

# **Exhibit 4**

**Redacted Version of  
Document Sought to  
Be Sealed**

# **Exhibit 5**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CALIFORNIA BERRY CULTIVARS, )  
LLC, )

Plaintiff, )

vs. ) No. 3:16-cv-02477-VC

THE REGENTS OF THE )  
UNIVERSITY OF CALIFORNIA, a )  
corporation, )

Defendant. )

AND RELATED CROSS-ACTION. )

---

A PORTION OF THIS TRANSCRIPT IS HIGHLY CONFIDENTIAL -

ATTORNEYS' EYES ONLY

DEPOSITION OF LUCKY WESTWOOD

PALO ALTO, CA

Tuesday, November 29, 2016

Volume I

Reported by: SUSAN F. MAGEE, RPR, CCRR, CLR

CSR No. 11661

Job No. 2487783

Pages 1-322

Pages 83-321 are HIGHLY CONFIDENTIAL - ATTORNEYS' EYES  
ONLY AND ARE BOUND SEPARATELY

Page 1

1 A. No.

2 Q. When does CBC plan on releasing its first  
3 plant?

4 A. Well, we haven't selected it yet, so it's hard  
5 to speculate. My own judgment, it will not be before  
6 two more years. I'd probably begin to be a little  
7 disappointed if it wasn't within four, but it won't be  
8 that soon, no.

9 Q. In your experience in the strawberry industry,  
10 how long does it normally take from the germination  
11 stage to release for a new variety?

12 A. Six to eight years.

13 Q. So if -- for the 2014 seeds, 2014 is Year 1?

14 A. Mm-hmm.

15 Q. So the hope is by year -- by Year 2020? Is  
16 that -- you'll release it?

17 A. Well, we hope to release something before that,  
18 but we haven't selected it yet again, so -- and there's  
19 a lot of process to that before it goes out. There's a  
20 lot more work to this to be done still.

21 Q. Once you pick a variety, there's a lot more  
22 work? What does that work involve?

23 A. We have to go through a whole cleanup stage.  
24 Strawberries are virus-indexed, and later on in our  
25 chronology we'll -- we'll take a certain number of



1 right to take the first clones.

2 Q. Still doing okay?

3 A. Yeah.

4 Q. A little while ago we were talking about the  
5 plans for release and the hope that somewhere around  
6 2018 that will be ready; is that correct?

7 A. I believe I said that I -- that I was hopeful  
8 that by 2018 we would have identified something that we  
9 would like to release. Actually releasing it at that  
10 time I think is probably a little overoptimistic.

11 Q. That hope for what you will identify, is it one  
12 specific variety?

13 A. I don't know. I don't know if we'll get one or  
14 more.

15 Q. That will be from the 2014 plants; correct?

16 A. Yes.

17 Q. Is the hope, then, that in 2019 you'll be ready  
18 to select from the 2015 plants?

19 A. Sure. I would hope that, yeah.

20 Q. Is it possible that you will select zero from  
21 the 2014 plants?

22 A. Yes.

23 Q. Is it possible that you will select zero from  
24 the 2015 plants?

25 A. Yes.

1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken  
4 before me at the time and place herein set forth; that  
5 any witnesses in the foregoing proceedings, prior to  
6 testifying, were administered an oath; that a record of  
7 the proceedings was made by me using machine shorthand  
8 which was thereafter transcribed under my direction;  
9 that the foregoing transcript is a true record of the  
10 testimony given.

11 Further, that if the foregoing pertains to the  
12 original transcript of a deposition in a Federal Case,  
13 before completion of the proceedings, review of the  
14 transcript [ ] was [X] was not requested.

15 I further certify I am neither financially  
16 interested in the action nor a relative or employee  
17 of any attorney or any party to this action.

18 IN WITNESS WHEREOF, I have this date subscribed  
19 my name.

20 Dated: December 9, 2016

21  
22  
23   
24

Susan F. Magee, CSR No. 11661

25 RPR, CCRR, CLR

*California Berry Cultivars, LLC v. The Regents of the University of California*  
Case No. 3:16-cv-02477-VC

**ERRATA SHEET**

**Witness: Lucky Westwood**  
**Deposition Date: January 5, 2017**

PAGE	LINE	CHANGE	REASON
93	17	"patent cultivar" should be "patented cultivar"	Transcription error
19	7	No, I don't dispute that the UC owns the Patent Rights to the cultivars	mispoke

**ACKNOWLEDGMENT OF DEPONENT**

I, Lucky Westwood, declare under penalty of perjury that I have read the foregoing pages 1 to 269 and that the same is a correct transcription of the answers given by me to the questions herein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

2/27/16  
DATE

  
SIGNATURE

# **Exhibit 6**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CALIFORNIA BERRY CULTIVARS, )  
LLC, )  
Plaintiff )  
vs. ) 16-cv-02477-VC  
THE REGENTS OF THE )  
UNIVERSITY OF CALIFORNIA, a )  
corporation, )  
Defendant )  
\_\_\_\_\_)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY  
Videotaped Deposition of Douglas V. Shaw, Ph.D.  
San Francisco, California  
Thursday, December 8, 2016

Reported by:  
JOANNE M. FARRELL, RPR, CRR  
CSR Nos. 4838(CA) 506(HI) 507(NM)  
Job No. 2492592  
Pages 1 - 293

1 of an initial selection, that's at least a year-long  
2 process?

3 A. Slightly more than a year, correct, yes.

4 Q. And then after an initial selection is  
5 made, there are further observations of the progeny  
6 from the two parents over a series of years to  
7 continually select down to the most high-performing  
8 plants, correct?

9 MR. LIPPETZ: Objection. Vague.

10 THE WITNESS: That is very vague but I  
11 think the answer is there is certainly a process  
12 that is multi-staged.

13 BY MR. CHIVVIS:

14 Q. And it takes years?

15 A. It can take years, yes.

16 Q. To reach a finished variety?

17 MR. LIPPETZ: Objection. Vague.

18 THE WITNESS: By "finished variety," you  
19 mean?

20 BY MR. CHIVVIS:

21 Q. A strawberry cultivar that is ready for  
22 commercial release to the public.

23 A. Yes.

24 Q. It takes at least four years from the  
25 selection of the parents to reaching a finished

1 variety, correct?

2 A. That's correct.

3 Q. Probably more than four years, right?

4 A. That's correct.

5 Q. In most cases it would take at least six  
6 years?

7 A. I would say a typical time would be six  
8 years, correct, yes.

9 Q. And it could take as long as 10?

10 A. In my experience it's never taken 10.

11 Q. Could take as long as eight?

12 A. In my experience we've -- we have never  
13 taken eight years, no.

14 Q. Seven?

15 A. Seven sometimes.

16 Q. So it could take as many as seven years  
17 from the cross-pollination of the parents to have a  
18 finished strawberry variety for release, correct?

19 MR. LIPPETZ: Objection. Vague.

20 THE WITNESS: Given the working definition  
21 that you've given me I'd say yes.

22 BY MR. CHIVVIS:

23 Q. All right. Let's back up a little bit.

24 In 2014, at least until November, you were  
25 still head of the university strawberry breeding



1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

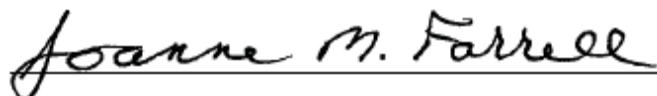
4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth;  
6 that any witnesses in the foregoing proceedings,  
7 prior to testifying, were administered an oath; that  
8 a record of the proceedings was made by me using  
9 machine shorthand which was thereafter transcribed  
10 under my direction; that the foregoing transcript is  
11 a true record of the testimony given.

12 Further, that if the foregoing pertains to the  
13 original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings review of  
15 the transcript { } was {X} was not requested.

16 I further certify I am neither financially  
17 interested in the action nor a relative or employee  
18 of any attorney or any party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21  
22 Dated: December 15, 2016

23   
24

25 Joanne M. Farrell, CSR No. 4838

# **Exhibit 7**

**Redacted Version of  
Document Sought to  
Be Sealed**

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

---

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,**

Cross-Complainant,

v.

**CALIFORNIA BERRY CULTIVARS, LLC, DOUGLAS SHAW, and KIRK LARSON,**  
Crossclaim Defendants.

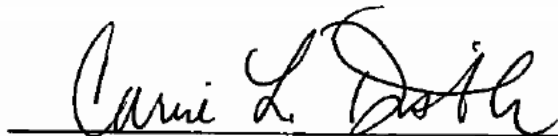
**Case No. 3:16-cv-02477-VC**

---

**REBUTTAL EXPERT REPORT OF**

**CARRIE L. DISTLER**

**Submitted February 21, 2017**

  
\_\_\_\_\_

**Highly Confidential – Subject to a Protective Order - Attorneys' Eyes Only**

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## I. INTRODUCTION

1. On January 21, 2017, I issued an expert report in this matter to present my opinions regarding damages to the University<sup>1</sup> should the University prevail in its claims against the Crossclaim Defendants<sup>2</sup> (“Opening Report”). In my Opening Report, I concluded that the University has sustained and (absent action by this Court) will continue to sustain economic damages as a result of the Crossclaim Defendants’ alleged wrongdoing. I understand the University is seeking injunctive relief to avoid future harm to the University. For Crossclaim Defendants’ alleged wrongdoing up to the date of trial or the entry of an injunction, my Opening Report calculated damages to the University in the form of disgorgement of the Crossclaim Defendants’ ill-gotten gains, the University’s unnecessary out-of-pocket costs, and a reasonable royalty for a license to use the Patents-at-Issue:<sup>3</sup>

- As a result of the Crossclaim Defendants’ alleged wrongdoing, the Crossclaim Defendants have benefited. Given CBC has yet to commercialize varieties and generate sales, the current benefit that CBC has enjoyed as a result of the alleged wrongdoing is in the form of investment to start CBC’s breeding program. Due to the Crossclaim Defendants’ alleged wrongdoing, CBC has received approximately \$4.5 million in capital contributions to date for the purpose of creating a competing breeding program and unquantified in-kind contributions from CBC’s affiliate in Spain.
- Though he was employed by UCD<sup>4</sup> until 2014, the last crosses by Dr. Shaw for developing future strawberry varieties at UCD<sup>5</sup> are from 2012. During the latter years of his employment at UCD, Dr. Shaw was directing a strawberry breeding program on behalf of CBC. Further, Drs. Shaw and Larson did not respond to Dr. Knapp’s requests for assistance in the University’s variety development of 2012

---

<sup>1</sup> As in my Opening Report, University refers to the Regents of the University of California.

<sup>2</sup> As in my Opening Report, Crossclaim Defendants refers to California Berry Cultivars, LLC (“CBC”), Douglas Shaw (“Dr. Shaw”), and Kirk Larson (“Dr. Larson”).

<sup>3</sup> The Opening Report also identified my professional credentials and hourly billing rates in this matter.

<sup>4</sup> As in my Opening Report, UCD refers to University of California-Davis.

<sup>5</sup> As in my Opening Report, the University’s or UCD’s Strawberry Berry Breeding Program is referred to as the “Program” or the “University’s Program”.

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non-patented Core Strawberry Germplasm and Transition Cultivars, but Dr. Dellaporta's analysis demonstrates this assumption is inaccurate. Mr. Nolte has provided no other explanation for how the University's alleged wrongdoing could have caused the damages in his report. Absent such a causal link, Mr. Nolte's damages are unsupported and unreliable.

188. Although I understand CBC had access to the non-patented Core Strawberry Germplasm and Transition Cultivars and utilized them extensively in its breeding program, for the purpose of responding to other aspects of Mr. Nolte's analysis, I assume CBC did not have such access.

**B. Assuming That the University's Alleged Wrongdoing Caused Some Delay, Mr. Nolte's Calculations are Incorrect**

189. Although, as discussed above, I understand that CBC had access to the non-patented Core Strawberry Germplasm and Transition Cultivars and utilized them extensively in its breeding program, for the purpose of this section, I assume CBC did not have such access. Even making this assumption, Mr. Nolte's calculations are significantly flawed. I describe some of those flaws in **Sections VI.B.1 through B.4**, and calculate an adjusted version of the hypothetical analysis offered by Mr. Nolte, correcting these flaws, in **Sections VI.B.5**.

**1. Mr. Nolte Has No Basis to Assume an Eight-Year Delay**

190. Mr. Nolte's damages assume the University's alleged failure to non-exclusively license the non-patented Core Strawberry Germplasm and Transition Cultivars will cause CBC to take an additional eight years to begin commercializing new varieties (compared to the timing absent the alleged wrongdoing).<sup>398</sup> The Nolte Report states CBC would commercialize its first new variety in 2019, but for the University's alleged wrongdoing.<sup>399</sup> His damage calculation therefore assumes CBC will not commercialize its first variety until 2027, and that the purported delay is attributable to CBC not having access to the Transition Cultivars and the non-patented Core Strawberry Germplasm. Mr. Nolte's assumption is based on discussions with Dr. Shaw

---

<sup>398</sup> Nolte Report, p. 3.

<sup>399</sup> Nolte Report, p. 3. Mr. Nolte has provided no support for this timing other than his discussions with Dr. Shaw and Mr. Westwood, and it is not apparent that this assumed timing is realistic. Nonetheless, for the purpose of critiquing Mr. Nolte's analysis, I assume initial commercialization in 2019 in the but-for world.

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and Mr. Westwood, and he does not identify any other support for such a delay.<sup>400</sup> It is not surprising that Mr. Nolte has failed to identify other support for this assumption, as it is contrary to much of the evidence in this matter. Rather than an eight-year delay, assuming erroneously that CBC did not have access to the non-patented Core Strawberry Germplasm and the Transition Cultivars, the University's alleged wrongdoing would have caused no more than a one- or two-year delay (if any).

191. CBC witnesses have testified that, despite their alleged lack of access due to the University's actions, CBC currently expects to begin generating income from its first variety as early as 2020 or 2021. Mr. Westwood testified to this potential timing,<sup>401</sup> as well as noting that CBC still hopes to release a new variety earlier than 2020.<sup>402</sup> Based on Mr. Westwood's testimony, it appears CBC's current expectation for its potential initial commercialization of a new variety reflects either no delay or a delay of only one year from the timing Mr. Nolte assumes would occur but for the University's alleged wrongdoing.<sup>403</sup> It should also be noted that Mr. Westwood appears to be referring to "crop years" (which end in June of each year),<sup>404</sup> whereas Mr. Nolte's analysis is based on calendar years ending in December;<sup>405</sup> therefore, Mr. Westwood's reference to crop year 2020 may actually relate to calendar year 2019 in Mr. Nolte's analysis, which would be *earlier* than the timing Mr. Nolte assumes would have occurred absent the University's alleged wrongdoing. The Nolte Report does not address this discrepancy

---

<sup>400</sup> Nolte Report, p. 3.

<sup>401</sup> Deposition of Lucky Westwood (30(b)(6)), Jan. 5, 2017, pp. 153-156; Deposition of Kyle VandenLangenberg, Dec. 21, 2016, p. 206.

<sup>402</sup> Deposition of Lucky Westwood, Nov. 29, 2016, p. 147.

<sup>403</sup> Mr. Nolte's but-for projection assumes CBC would begin generating revenue in 2020 (Nolte Report, Exhibit 1), the same year Mr. Westwood identified as the first year in which CBC expects it may actually earn income from new varieties. Mr. Westwood also appears to give potentially conflicting testimony suggesting that CBC expects it may begin generating revenue from new varieties in crop year 2021 or 2022 (Deposition of Lucky Westwood (30(b)(6)), Jan. 5, 2017, p. 155-156.); this later potential commercialization would still reflect a delay of less than two years from Mr. Nolte's assumed initial commercialization absent the University's alleged wrongdoing.

<sup>404</sup> Deposition of Lucky Westwood (30(b)(6)), Jan. 5, 2017, p. 155-156.

<sup>405</sup> Although not explicitly stated in Mr. Nolte's report, the number of years he applies in discounting his projected lost profits indicates he is using calendar years rather than crop years.

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*The Regents of the University of California v. California Berry Cultivars, LLC, et al.*

between Mr. Westwood's testimony and the assumption of an 8-year delay that provides the basis for Mr. Nolte's damage calculation.<sup>406</sup>

192. Even assuming CBC will not commercialize its first variety by 2021 (a delay of approximately two years from Mr. Nolte's but-for scenario), there is no basis to attribute any additional delay to the University's alleged wrongdoing. According to Dr. Shaw, the development of a new variety from initial crosses through commercialization takes *up to* seven years.<sup>407</sup> In Dr. Shaw's experience, it has never taken as many as eight years to develop a new variety.<sup>408</sup> Dr. Shaw indicated a similar development timeframe of approximately five to seven years in internal correspondence with Dr. Vandenlangenberg.<sup>409</sup> This development timeframe is also consistent with the University's experience during Dr. Shaw's employment. The University produced a document identifying the original cross year and the first year of plant sales for 19 of its individually patented varieties, of which 14 developed from crosses performed during Dr. Shaw's tenure at UCD.<sup>410</sup> Every one of those 14 varieties began generating sales between five and seven years after the initial crosses were performed.<sup>411</sup> Even if the University's actions had required CBC to begin its breeding program without access to the Core Strawberry Germplasm and Transition Cultivars (which is incorrect, as noted above), CBC should have reasonably expected to commercialize its first variety in approximately seven years – that is, by 2020 or 2021, not 2027 as Mr. Nolte hypothesizes.<sup>412</sup> Therefore, there is no basis to attribute any commercialization delays beyond 2020 or 2021 to the alleged wrongdoing cited by Mr. Nolte, and any damages should be limited to a delay of no more than one or two years, as I will show when calculating an adjusted calculation below in **Section VI.B.5..**

---

<sup>406</sup> Mr. Nolte's failure to address this discrepancy is particularly noteworthy given that his sole source for the assumption of an 8-year delay is discussions with Mr. Westwood and Mr. Shaw.

<sup>407</sup> Deposition of Douglas Shaw, Dec. 8, 2016, p. 44.

<sup>408</sup> Deposition of Douglas Shaw, Dec. 8, 2016, p. 44.

<sup>409</sup> Deposition of Kyle VandenLangenberg, Dec. 21, 2016, Exhibit 324 (CBC00009328).

<sup>410</sup> UC\_STRAW2\_00045273.

<sup>411</sup> See **Schedule 20**.

<sup>412</sup> CBC's initial crosses were performed in late 2013 or early 2014 (Deposition of Lucy Westwood, Jan. 5, 2017, pp. 189-190). 2020 and 2021 are six and seven years after 2014, respectively. It should be noted that this is consistent with the potential commercialization timing indicated by Mr. Westwood (Deposition of Lucky Westwood (30(b)(6)), Jan. 5, 2017, pp. 153-156).



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Case No. 3:16-cv-02477-VC  
*The Regents of the University of California v. California Berry Cultivars, LLC, et al.*

**E. Conclusion**

214. Dr. Nolte’s analysis is based on the assumption that CBC’s breeding program has been delayed as a result of the University’s purported failure to “share access and ownership to the plant materials as of December 1, 2014.”<sup>454</sup> However CBC has used the Core Strawberry Germplasm and Transition Cultivars extensively in its breeding program to-date.<sup>455</sup> As such, any alleged delay to CBC’s commercialization of varieties is not the result of a lack of access to the University’s materials, and there are no damages caused by the University’s alleged wrongdoing. Even if one were to assume (erroneously) that CBC has been delayed by the University’s alleged wrongdoing, CBC has been harmed by no more than \$600,000 or \$1.1 million.

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<sup>454</sup> Nolte Report, p. 5.

<sup>455</sup> Dellaporta Report, Sections IV and V, Appendices B-H.

# SCHEDULE 21

United States District Court Northern District of California San Francisco Division

Case No. 3:16-cv-02477-VC

*The Regents of the University of California v. California Berry Cultivars, LLC et al.*

**Schedule 21a. Nolte Royalty Overestimate Examples - Monterey, San Andreas, and Portola**

	Monterey	San Andreas	Portola	University Average [7]
8-Year Historical Total [1]	\$			
12-Year Nolte Projection Total [2]				
Last 12 years as percentage of first 8 years [3]				
Last 12 years projection based on University variety experience [4]	\$			
Nolte Overstatement [5]	\$			
Nolte Overstatement percentage [6]	242.7%	89.6%	278.7%	

Sources / Notes:

[1] See **Schedule 21.1.**

[2] See **Schedule 21.1.**

[3] Calculated as [2] divided by [1].

[4] Calculated as 8-Year Historical Total for each variety multiplied by the 75.8% average of total royalties from years 9 through 20 as a percentage of total royalties in the first eight years.

[5] Calculated as [2] less [4].

[6] Calculated as [5] divided by [4].

[7] See **Schedule 17.1.**

United States District Court Northern District of California San Francisco Division

Case No. 3:16-cv-02477-VC

*The Regents of the University of California v. California Berry Cultivars, LLC et al.*

**Schedule 21b. Nolte Royalty Overestimate Examples - Albion**

	Albion	University Average [7]
12-Year Historical Total [1]	\$	
8-Year Nolte Projection Total [2]		
Last 8 years as percentage of first 12 years [3]		
Last 8 years projection based on University variety experience [4]	\$	
Nolte Overstatement [5]	\$	
Nolte Overstatement percentage [6]		

Sources / Notes:

[1] *See* **Schedule 21.1.**

[2] *See* **Schedule 21.1.**

[3] Calculated as [2] divided by [1].

[4] Calculated as 12-Year Historical Total for each variety multiplied by the 17.2% average of total royalties from years 13 through 20 as a percentage of total royalties in the first 12 years.

[5] Calculated as [2] less [4].

[6] Calculated as [5] divided by [4].

[7] *See* **Schedule 17.1.**

United States District Court Northern District of California San Francisco Division

Case No. 3:16-cv-02477-VC

*The Regents of the University of California v. California Berry Cultivars, LLC et al.*

**Schedule 21c. Nolte Royalty Overestimate Examples - Camino Real and Ventana**

	Camino Real	Ventana	University Average [7]
15-Year Historical Total [1]	\$		
5-Year Nolte Projection Total [2]			
Last 5 years as percentage of first 15 years [3]			
Last 5 years projection based on University variety experience [4]	\$		
Nolte Overstatement [5]	\$		
Nolte Overstatement percentage [6]	<b>444.3%</b>	<b>316.3%</b>	

Sources / Notes:

[1] *See* **Schedule 21.1.**

[2] *See* **Schedule 21.1.**

[3] Calculated as [2] divided by [1].

[4] Calculated as 15-Year Historical Total for each variety multiplied by the 6.9% average of total royalties from years 16 through 20 as a percentage of total royalties in the first 15 years.

[5] Calculated as [2] less [4].

[6] Calculated as [5] divided by [4].

[7] *See* **Schedule 17.1.**

United States District Court Northern District of California San Francisco Division  
Case No 3:16-cv-02477-VC  
*The Regents of the University of California v. California Berry Cultivars, LLC et al.*

**Schedule 21.1. Historical and Nolte Projected Royalties for University Varieties**

	Historical Performance [1]		
	Monterey	San Andreas	Portola
Year 0 [2]			
Year 1			
Year 2			
Year 3			
Year 4			
Year 5			
Year 6			
Year 7			
Year 8			
8-Year Total			

	Nolte Projection [3]		
	Monterey	San Andreas	Portola
Year 9	\$ 1,699,435	\$ 2,124,294	\$ 833,722
Year 10	1,523,730	1,904,663	675,828
Year 11	1,268,648	1,585,810	613,934
Year 12	1,245,183	1,556,478	603,502
Year 13	1,040,000	1,300,000	583,809
Year 14	1,040,000	1,300,000	637,498
Year 15	800,000	1,000,000	514,624
Year 16	800,000	1,000,000	500,000
Year 17	800,000	1,000,000	500,000
Year 18	560,000	700,000	500,000
Year 19	560,000	700,000	500,000
Year 20	560,000	700,000	500,000
12-Year Total	\$ 11,896,996	\$ 14,871,245	\$ 6,962,917

	Historical Performance [1]
	Albion
Year 0 [2]	
Year 1	
Year 2	
Year 3	
Year 4	
Year 5	
Year 6	
Year 7	
Year 8	
Year 9	
Year 10	
Year 11	
Year 12	
12-Year Total	

	Nolte Projection [3]
	Albion
Year 13	\$ 1,300,000
Year 14	1,300,000
Year 15	1,000,000
Year 16	1,000,000
Year 17	1,000,000
Year 18	700,000
Year 19	700,000
Year 20	700,000
8-Year Total	\$ 7,700,000

	Historical Performance [1]	
	Camino Real	Ventana
Year 0 [2]		
Year 1		
Year 2		
Year 3		
Year 4		
Year 5		
Year 6		
Year 7		
Year 8		
Year 9		
Year 10		
Year 11		
Year 12		
Year 13		
Year 14		
Year 15		
15-Year Total		

	Nolte Projection [3]	
	Camino Real	Ventana
Year 16	300,000	500,000
Year 17	300,000	500,000
Year 18	300,000	500,000
Year 19	300,000	500,000
Year 20	300,000	500,000
5-Year Total	\$ 1,500,000	\$ 2,500,000

Sources / Notes:

[1] UC\_STRAW2\_00075844-846 at 845

[2] First year of indicated royalties appears to be comprised primarily of upfront licensing fees Excluded from calculation

[3] Nolte Report, Exhibit 1

# **Exhibit 8**



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March 9, 2017

Frederick McKnight, Esq.  
Jones Day  
555 S. Flower Street, 50th Floor  
Los Angeles, CA 90071

Dear Mr. McKnight:

This supplemental report is provided in connection with California Berry Cultivars, LLC ("CBC") vs. the Regents of the University of California ("UC") (USDC Case No. 3:16-cv-02477). This report occurs because of the following:

1. On January 21, 2017 Fulcrum issued a report that included (Emphasis in the original):

*"A more accurate calculation would consider the actual units shipped to each of these territories, applied to rates that CBC would use for each geography. I intend to perform such a calculation promptly using the same general methodology described below. The more accurate calculation predictably will increase the amount of lost profits, most likely by a significant amount."*

2. In a supplemental report dated February 21, 2017, Ms. Carrie Distler included comments regarding CBC's claims for damages (her Section VI, consisting of her paragraphs 180 to 214). Certain of Ms. Distler's comments encourage Fulcrum to perform additional calculations, which are submitted in this supplemental report.

Except for the additions specifically noted herein, Fulcrum's entire January 21, 2017 report remains unchanged. Without limiting the generality of the foregoing, with the possible exception of the additional calculations attached hereto, none of Ms. Distler's comments cause me to modify any of the previously-reported conclusions. Additionally, because this supplemental report is limited to providing and explaining additional calculations, the fact that this supplemental report does not rebut conceptual errors made by Ms. Distler should not be interpreted as agreement with Ms. Distler; stated otherwise, no assumption should be made that I agree with any portion of Ms. Distler's Section VI because I do not include a discussion of why she is wrong.

In order to help avoid duplicate references and any related confusion, all lists and exhibit numbers herein will continue from what was started in Fulcrum's January 21, 2017 report.

**I. DESCRIPTION OF ENGAGEMENT** (no change)

**II. FACTUAL & LEGAL BACKGROUND**

CBC additionally provided the following information regarding the rates that CBC would charge, which are used in the additional calculations and conclusions expressed herein. The following rates generally are a 25% rate increase for all three territories:



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1. \$10.00 per 1,000 plants in California
2. \$11.25 per 1,000 in the U.S. outside of California
3. \$21.00 per 1,000 plants internationally

Because of the use of increased royalty rates, the 25% overall revenue increase used in Fulcrum's January 21, 2017 report is not used herein. Nevertheless, CBC continues to have opportunities for increased revenues that are not part of Fulcrum's calculations herein because of the other factors described in Fulcrum's January 21, 2017 report.

### III. INFORMATION RELIED UPON

In addition to those records described in Fulcrum's January 21, 2017 report, Fulcrum relied on the following:

8. Ms. Distler's February 21, 2017 report, including all documents to which Ms. Distler cites
9. Other documents and publicly-available information, as referenced herein

### IV. SUMMARY OF FULCRUM'S CONCLUSIONS

As a result of using (i) plant quantities (vs. currency amounts) and (ii) other changes encouraged by Ms. Distler's February 21, 2017 report, the present value of lost profits comparing the but-for and actual worlds is from roughly **\$34.3 million to \$47.9 million**. There are three reasons for these amounts relative to what Fulcrum reported on January 21, 2017, which are described in the following three additional sections.

#### A. Consideration of Additional Discount Rate Alternatives

In her paragraphs 193 and 194, Ms. Distler criticizes Fulcrum's January 21, 2017 report because:

*"... The Nolte Report does not include any analysis supporting this discount rate. Mr. Nolte simply claims (without identifying any support) that this 15% is 'a reasonable discount rate for an established technology-based endeavor...."*

Fulcrum's discount rate calculations are based on generally-accepted methods on this subject. Although she misapplies inputs into these calculations and presents only partial calculations, Ms. Distler uses these same methods in her February 21, 2017 supplemental report. Specifically, Ms. Distler presents two dramatically different conclusions regarding discount rates, which (once fixed) can be used to explain why a 15% discount rate is on the high range of what is reasonable. To ensure an agreed starting point to those unfamiliar with discount rates, a decrease in the discount rate will increase damages (because of a lower present value discount). The reverse is also true.

Ms. Distler's discount rate conclusions are:

1. When Ms. Distler is calculating UC's damages, her claimed discount rate is 7.5%.<sup>1</sup> This 7.5% is calculated using a weighted average cost of capital (usually abbreviated WACC in the field of corporate finance), with approximately 50% attributed to debt and 50% attributed to equity (ownership) capital. Even though Ms. Distler claims that my 15% rate is too low when evaluating a strawberry breeding program, her damage calculation for UC's strawberry breeding

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<sup>1</sup> Distler Schedule 2c.2 from Ms. Distler's February 21, 2017 report

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program uses a 7.5% rate. While I do not agree that 7.5% is appropriate to use for either UC or CBC, Ms. Distler's objectivity can and should be called into question when she uses such transparently different conclusions for UC's vs. CBC's damages (see #2 immediately below) involving what she contends are highly similar strawberry breeding programs.

2. When Ms. Distler is calculating CBC's damages, her claimed discount rate is 20%.<sup>2</sup> Inexplicably, unlike UC's WACC, when performing a calculation for CBC, Ms. Distler fails to include any debt (which lowers the WACC). Ms. Distler concludes that CBC's cost of equity (ownership) capital is 20%, nearly twice what she used for this parameter for UC.

Part of Ms. Distler's 20% cost of equity capital is based on an industry adjustment that is based on other publicly-traded companies in the agricultural segment. These companies can be considered in determining the percentage of debt and equity in the WACC. For the agricultural companies that Ms. Distler uses in this calculation, the average weighting is approximately 30% debt and 70% equity.

The determination of individual inputs to the calculation of a discount rate can vary based on different ways of financing an enterprise. Each decision affects other inputs. The most common example involves the use of excessive debt in the capital structure, in which case the cost of equity (ownership) capital increases because the risk of business failure increases. Alternatively, if no debt exists, the cost of equity (ownership) capital decreases because business's financial risks decrease.

Putting aside Ms. Distler's transparent inconsistencies and advocacy, one can use information from Ms. Distler's February 21, 2017 report to confirm the reasonableness of the discount rate that Fulcrum used. The following illustrates that the 15% discount rate used in Fulcrum's January 21, 2017 report is at the high end of the range of reasonableness:

1. For purposes of a cost of equity capital, this illustration uses Ms. Distler's 20% cost of equity capital. This is a high starting point that provides a basis for the discount rate actually being lower than what Fulcrum presents herein.
2. For purposes of determining the percentage of debt and equity, Ms. Distler's work supports two alternatives, at either 50% or 70% equity, and either 50% or 30% debt. Because two alternatives are considered, the discount rate will be expressed as a range.
3. For purposes of the cost of debt, Fulcrum uses the prime rate (currently 3.75%) plus 200 basis points (2%). It is likely that a lower spread than 200 basis points is possible, particularly once the first cultivars have been commercialized, so this debt rate illustration provides a basis for the discount rate being lower than what Fulcrum presents herein.

With these inputs, the discount rate is calculated under two alternatives, as follows:

Table 1: WACC (discount rate) calculation using Ms. Distler's inputs

	50% debt & 50% equity	70% equity & 30% debt
Cost of Equity	20%	Same
Cost of Debt	5.75%	
Tax Rate	40%	
Weighted Average (aka discount rate)	12%	15%

<sup>2</sup> Distler Schedule 2b.1 from Ms. Distler's February 21, 2017 report

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In summary, the 15% discount rate used in Fulcrum's January 21, 2017 is reasonable (if not high, as described above). With a single input change that Ms. Distler uses for UC, a 12% discount rate is the correct result. Fulcrum's discount rate range (i.e., 12% to 15%) is used in the rest of this report.

## **B. Use of Plant Quantities** (vs. currency amounts)

See #1 in the introduction to this supplemental report. Related calculations of these amounts are shown on Exhibit 5 (Exhibits 1 through 4 are used in Fulcrum's January 21, 2017 report). As before, to determine the expected results of the eight missing cultivars, one needs to consider the entire licensing life. The expected results are determined by analyzing nine existing cultivars, and must include projections of royalties for the six cultivars that are not at the end of their licensing life. With the benefit of licensing information for each of the three territories (i.e., California, the United States outside of California, and international), projections were considered for each territory, as described herein.

In making its projections, Fulcrum looked for patterns in the historic plant quantity data. We observed that most cultivars would remain at certain sales levels for between three and seven years, drop by a certain amount, and continue at the sales level for a slightly shorter period, then drop again. Fulcrum's projections used this terraced sale structure. Fulcrum also noted that certain cultivars followed the revenue patterns of other cultivars later in their life. In those cases, Fulcrum's projections sought to follow the trends of other cultivars.

The plant quantity information<sup>3</sup> provides data through some part of 2014; the royalty dollar information<sup>4</sup> provides data through 2016. Fulcrum checked the reasonableness of the 2014, 2015 and 2016 projections by noting that the projected 2014, 2015 and 2016 plant quantities would result in the approximate royalty amounts that UC actually collected. The quantity information in 2014 appears to be incomplete for certain cultivars because the royalties that would have been collected on the quantities listed in 2014 were significantly less than the royalty amounts that UC actually collected. Related calculations are shown in Exhibit 7. In pages 4 through 6 of Exhibit 5, the data that is estimated with the benefit of royalty dollar information is highlighted in red. As shown in Exhibit 7, the overall difference between the plant data in 2014, 2015 and 2016 compared to the currency data in the same years is insignificant.

Importantly, Fulcrum continued to limit projections to no more than 21 years of royalties. International licensing, which may not be limited to the 20-year U.S. patent life, comprises additional licensing revenues. Nevertheless, in order to ensure that the damage calculation is not overstated, the 21-year limitation continues to be used, which has the known effect of understating the total value of international licensing.

As occurred before, as a reasonableness check on the above estimates for six of the existing cultivars, Fulcrum made a second calculation of future expected revenues using an arithmetic average of royalties for whatever actual licensing period exists for that cultivar. The results of this reasonableness check are shown on Exhibit 6, and result in a lifetime royalty estimate of \$20,100,000,<sup>5</sup> which supports the reasonableness of the first (primary) calculation Fulcrum prepared.

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<sup>3</sup> UC STRAW2 00058007

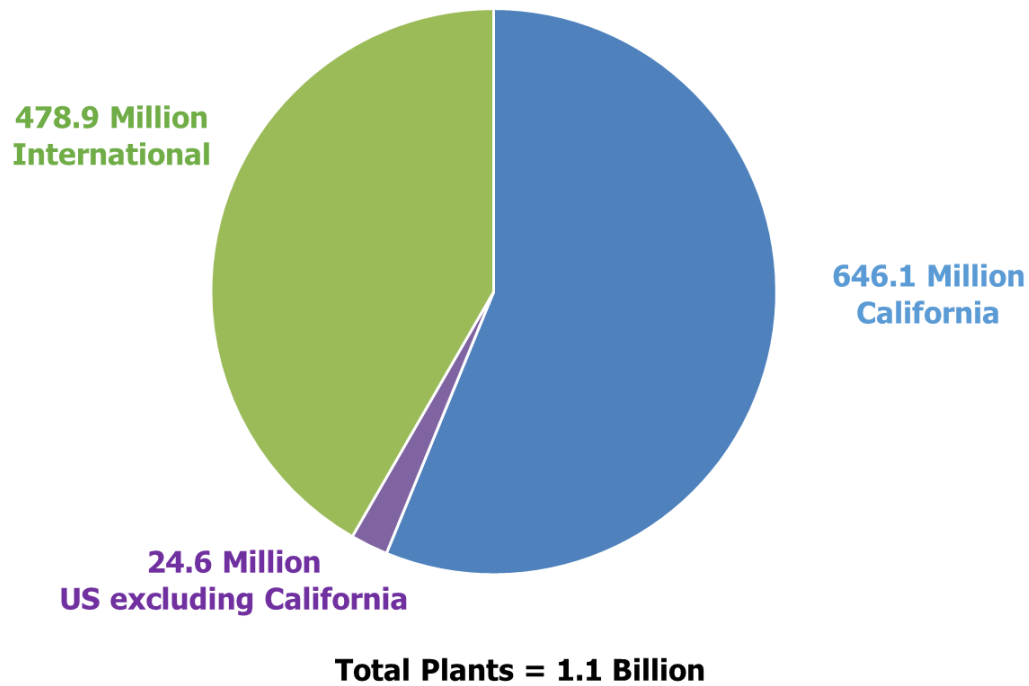
<sup>4</sup> UC STRAW2 00075844

<sup>5</sup> Rounded from \$20,099,000. See Exhibit 6 p.2

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For the nine cultivars used by Fulcrum to estimate the eight missed cultivars, a chart showing the actual and expected results follows:

### **Average Unit Sales of Cultivars Used in Model**

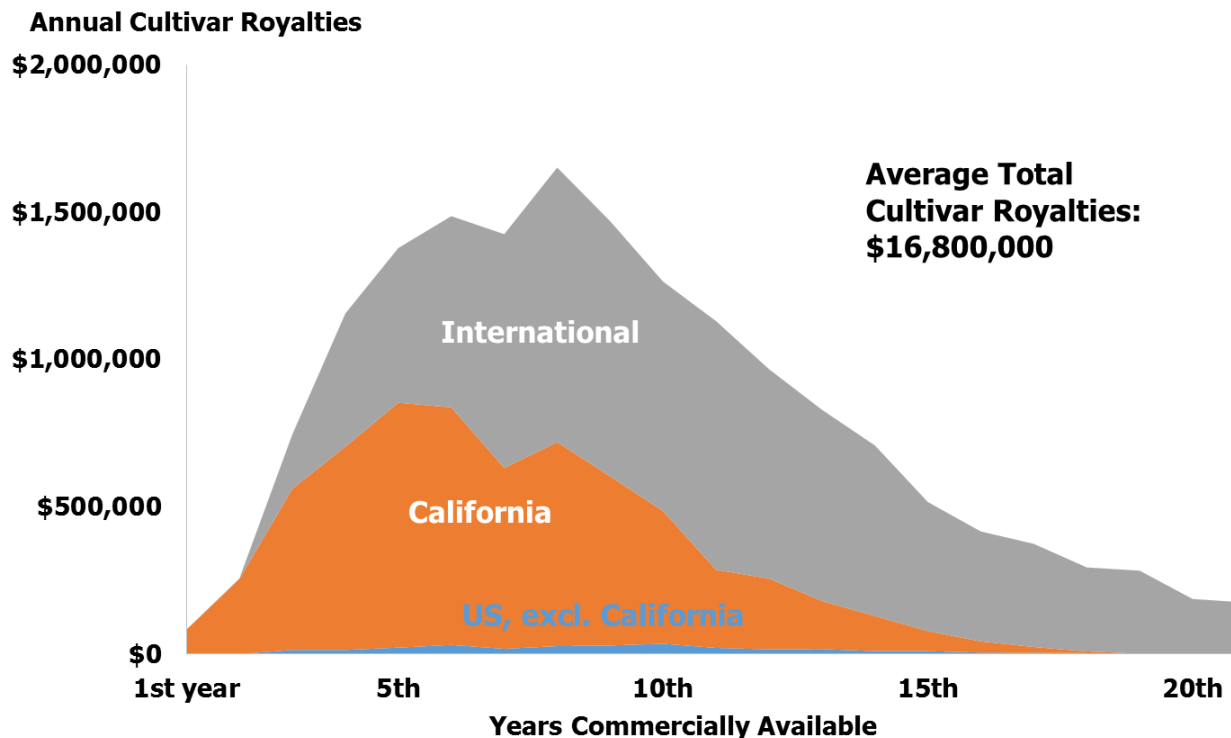


**Source: UC STRAW2 00058007**

When priced based on CBC's royalty rates, the source and timing of CBC's expected average royalties for each of the eight missed cultivars is charted as follows:

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## CBC's average expected royalties for each new cultivar average \$16.8 million



**Source: UC STRAW2 00058007**

Using the same methodology described in Fulcrum's January 21, 2017 report, Fulcrum's revised calculations show:

1. The average cultivar generates \$16,800,000<sup>6</sup> for CBC in lifetime royalties.
2. Over the eight years that CBC will miss cultivars because of UC's conduct, CBC will miss \$134,400,000 of royalties (calculated as eight cultivars, at an average of \$16,800,000 for each cultivar).
3. Using a 15% discount rate, the damages resulting from the discounting of eight years of missed cultivars is \$34,300,000.<sup>7</sup> Using a 12% discount rate, the damages resulting from the discounting of eight years of missed cultivars is \$47,900,000.<sup>8</sup>
4. The present value discount is the difference between the cash flows that would have eventually been received, and the amount of damages that are calculated based on their present value.

<sup>6</sup> Rounded from \$16,794,000. See Exhibit 5 p. 3

<sup>7</sup> Rounded from \$34,258,357. See Exhibit 5 p. 1

<sup>8</sup> Rounded from \$47,947,397. See Exhibit 5 p. 2

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- a. Using 15%, the difference between the \$134,400,000 of undiscounted royalties, and the \$34,300,000 of damages presented herein, is \$100,100,000. The total discount is 75 percent.<sup>9</sup>
- b. Using 12%, the difference between the \$134,400,000 of undiscounted royalties, and the \$47,900,000 of damages presented herein, or \$86,400,000. The total discount is 64 percent.<sup>10</sup>

### C. Consideration of Different Periods Needed before Cultivars can be Commercialized

Based on input from CBC, Fulcrum initially used eight years as the period needed to develop a cultivar that was ready for commercialization. Ms. Distler criticizes the use of this eight-year parameter, and advocates a three-year damages period. Given that (i) CBC has been denied access to plant materials since Drs. Shaw and Larson left UC's employ in November 2014 and (ii) no cultivar has been released or is expected to be released by CBC in 2017, the three-year period Ms. Distler advocates is too short. Nevertheless, if CBC's scientific endeavors are particularly successful, and/or UC decides post-trial that it wishes to cooperate with CBC, perhaps a shorter period could be applicable. For this reason, Fulcrum considered alternatives other than the eight-year development period discussed in Fulcrum's January 21, 2017 report.

If a shorter development period is applicable, two offsetting changes occur. Specifically:

1. The number of cultivars for which damages are calculated decreases - In isolation, a decrease in the number of lost cultivars decreases the damage amount.
2. The period of time occurring before cultivars are available for commercial exploitation decreases - In isolation, a decrease in the time occurring before cultivars are available for commercial exploitation increases the damage amount because there is a smaller present value discount.

The net offsetting effect causes damages to change less than what one might expect when additional years of development occur. By using the eight years contained in Fulcrum's January 21, 2017 report (and the 15% discount rate), damages were actually smaller than what could have occurred using other parameters. Damages using alternative assumptions are calculated in Exhibit 8, and are summarized below:

Table 2: Summary of Damages using Different Discount Rate and Time Inputs

First Commercial Cultivar (# Years)	Damages Using Discount Rate		Calculation Source
	15%	12%	
2015 (4 years)	\$31.3 million	\$37.6 million	Exhibit 8 pp. 1, 5
2016 (5 years)	33.6 million	42.0 million	Exhibit 8 pp. 2, 6
2017 (6 years)	34.7 million	45.0 million	Exhibit 8 pp. 3, 7
2018 (7 years)	34.8 million	46.9 million	Exhibit 8 pp. 4, 8
2019 (8 years)	34.3 million	47.9 million	Exhibit 5 pp. 1, 2

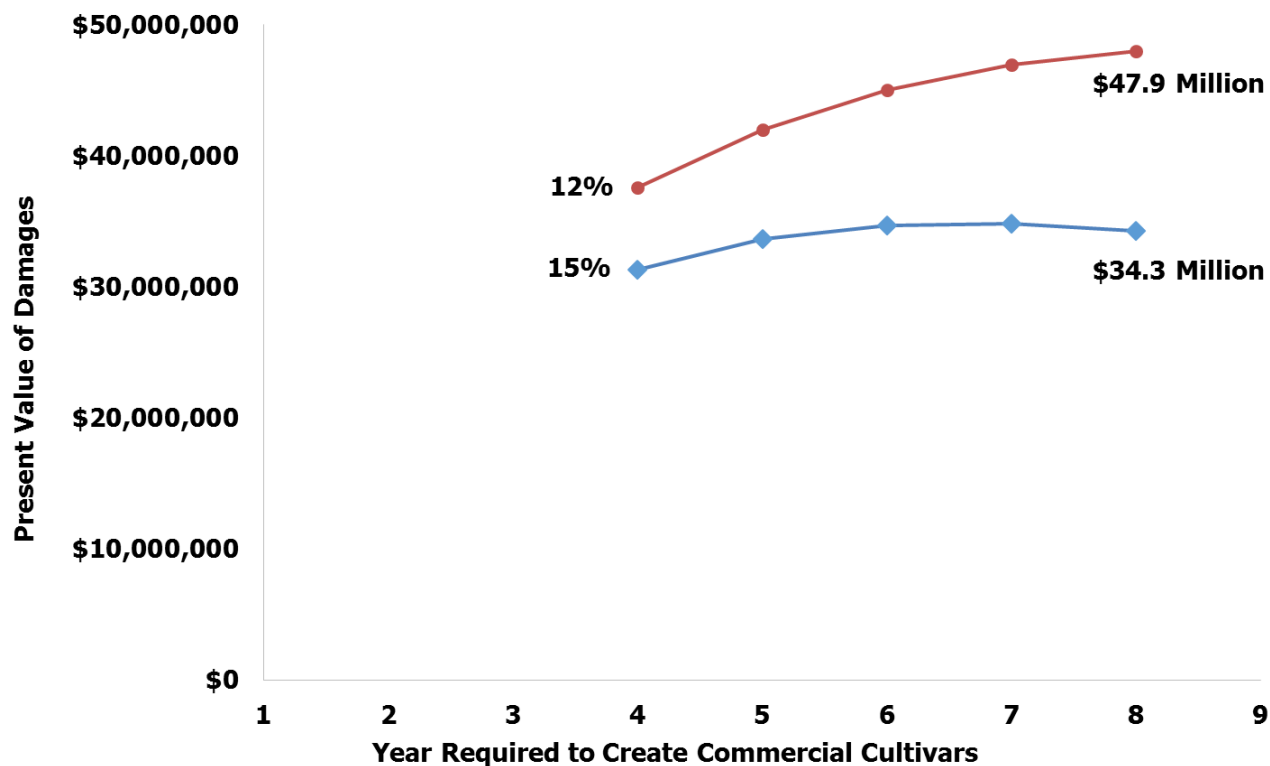
A graph showing the preceding table follows:

<sup>9</sup> See Exhibit 5 p. 1

<sup>10</sup> See Exhibit 5 p. 2

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## Range of CBC's Damages



The following table additionally shows the results of calculations for the 7.5% and 20% discount rates that Ms. Distler concludes is appropriate for CBC and UC, respectively:

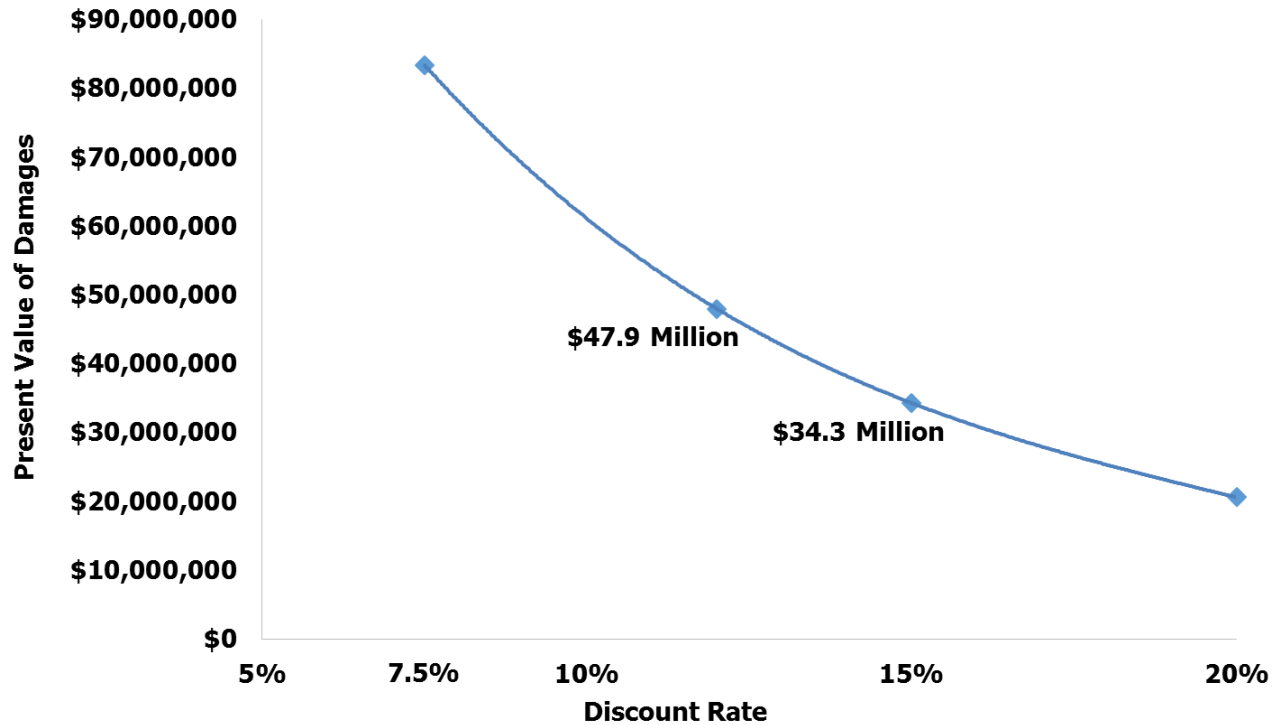
Table 3: Changes in damages using alternative discount rates

Discount Rate	Damages	Calculation Source
7.5%	\$ 83.4 million	Exhibit 8 p. 9
12%	47.9 million	Exhibit 5 p. 1
15%	34.3 million	Exhibit 5 p. 2
20%	20.6 million	Exhibit 8 p. 10

Discount rates have a dramatic impact on the calculation results, particularly when the extreme rates advocated by Ms. Distler are used. A graph showing the effect of discount rate on the damage amounts follows. The following graph illustrates the impact on the eight-year development period scenario, although a similar result would be seen using the other development period scenarios.

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## Using a Range of Reasonable Discount Rates, Damages are in the Range of \$34.3 to \$47.9 Million



Source: Assumes an 8 Year Delay

### V. OTHER REQUIRED INFORMATION (see the January 21, 2017 report)

Very truly yours,  
Fulcrum Financial Inquiry LLP

By: 

David Nolte



California Berry Cultivars vs. University of California  
Exhibit 8: Lost Revenue Model  
Alternate Trend Analysis Projections

Net Discount Rate 11% [2]  
Years of Delay 4 Years

		<i>A</i>	<i>B</i>			<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years								
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Subtotal	Present Value
2015	0	1	\$ 83,000				\$ 83,000	\$ 83,000
2016	0	1	257,000	\$ 83,000			340,000	340,000
2017	0.5	0.95	746,000	257,000	\$ 83,000		1,086,000	1,030,786
2018	1.5	0.86	1,156,000	746,000	257,000	\$ 83,000	2,242,000	1,917,128
2019	2.5	0.77	1,378,000	1,156,000	746,000	257,000	3,537,000	2,724,756
2020	3.5	0.69	1,486,000	1,378,000	1,156,000	746,000	4,766,000	3,307,681
2021	4.5	0.63	1,425,000	1,486,000	1,378,000	1,156,000	5,445,000	3,404,431
2022	5.5	0.56	1,651,000	1,425,000	1,486,000	1,378,000	5,940,000	3,345,878
2023	6.5	0.51	1,469,000	1,651,000	1,425,000	1,486,000	6,031,000	3,060,483
2024	7.5	0.46	1,264,000	1,469,000	1,651,000	1,425,000	5,809,000	2,655,700
2025	8.5	0.41	1,130,000	1,264,000	1,469,000	1,651,000	5,514,000	2,271,023
2026	9.5	0.37	967,000	1,130,000	1,264,000	1,469,000	4,830,000	1,792,168
2027	10.5	0.33	829,000	967,000	1,130,000	1,264,000	4,190,000	1,400,628
2028	11.5	0.30	708,000	829,000	967,000	1,130,000	3,634,000	1,094,386
2029	12.5	0.27	516,000	708,000	829,000	967,000	3,020,000	819,350
2030	13.5	0.24	416,000	516,000	708,000	829,000	2,469,000	603,477
2031	14.5	0.22	374,000	416,000	516,000	708,000	2,014,000	443,482
2032	15.5	0.20	294,000	374,000	416,000	516,000	1,600,000	317,405
2033	16.5	0.18	283,000	294,000	374,000	416,000	1,367,000	244,309
2034	17.5	0.16	187,000	283,000	294,000	374,000	1,138,000	183,227
2035	18.5	0.15	175,000	187,000	283,000	294,000	939,000	136,204
2036	19.5	0.13		175,000	187,000	283,000	645,000	84,287
2037	20.5	0.12			175,000	187,000	362,000	42,617
2038	21.5	0.11				175,000	175,000	18,561
Notes:							\$ 67,176,000	\$ 31,320,968

[1] Uses mid-year convention

[2] 15% discount rate less assumed 4% long-term growth rate

53%

California Berry Cultivars vs. University of California  
Exhibit 8: Lost Revenue Model  
Alternate Trend Analysis Projections

Net Discount Rate 11% [2]  
Years of Delay 5 Years

		<i>A</i>	<i>B</i>						<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Subtotal	Present Value		
2016	0	1	\$ 83,000					\$ 83,000	\$ 83,000		
2017	0.5	0.95	257,000	\$ 83,000				340,000	322,714		
2018	1.5	0.86	746,000	257,000	\$ 83,000			1,086,000	928,636		
2019	2.5	0.77	1,156,000	746,000	257,000	\$ 83,000		2,242,000	1,727,142		
2020	3.5	0.69	1,378,000	1,156,000	746,000	257,000	\$ 83,000	3,620,000	2,512,338		
2021	4.5	0.63	1,486,000	1,378,000	1,156,000	746,000	257,000	5,023,000	3,140,579		
2022	5.5	0.56	1,425,000	1,486,000	1,378,000	1,156,000	746,000	6,191,000	3,487,261		
2023	6.5	0.51	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	7,096,000	3,600,926		
2024	7.5	0.46	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	7,409,000	3,387,172		
2025	8.5	0.41	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	7,295,000	3,004,554		
2026	9.5	0.37	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	6,939,000	2,574,712		
2027	10.5	0.33	967,000	1,130,000	1,264,000	1,469,000	1,651,000	6,481,000	2,166,460		
2028	11.5	0.30	829,000	967,000	1,130,000	1,264,000	1,469,000	5,659,000	1,704,219		
2029	12.5	0.27	708,000	829,000	967,000	1,130,000	1,264,000	4,898,000	1,328,867		
2030	13.5	0.24	516,000	708,000	829,000	967,000	1,130,000	4,150,000	1,014,350		
2031	14.5	0.22	416,000	516,000	708,000	829,000	967,000	3,436,000	756,606		
2032	15.5	0.20	374,000	416,000	516,000	708,000	829,000	2,843,000	563,989		
2033	16.5	0.18	294,000	374,000	416,000	516,000	708,000	2,308,000	412,484		
2034	17.5	0.16	283,000	294,000	374,000	416,000	516,000	1,883,000	303,178		
2035	18.5	0.15	187,000	283,000	294,000	374,000	416,000	1,554,000	225,411		
2036	19.5	0.13	175,000	187,000	283,000	294,000	374,000	1,313,000	171,580		
2037	20.5	0.12		175,000	187,000	283,000	294,000	939,000	110,546		
2038	21.5	0.11			175,000	187,000	283,000	645,000	68,409		
2039	22.5	0.10				175,000	187,000	362,000	34,589		
2040	23.5	0.09					175,000	175,000	15,064		
								<u>\$ 83,970,000</u>	<u>\$ 33,644,789</u>		

Notes:

[1] Uses mid-year convention  
[2] 15% discount rate less assumed 4% long-term growth rate

60%

**California Berry Cultivars vs. University of California****Exhibit 8: Lost Revenue Model**

## Alternate Trend Analysis Projections

Net Discount Rate 11% [2]

Years of Delay 6 Years

		<i>A</i>	<i>B</i>							<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Subtotal	Present Value		
2017	0.5	0.95	\$ 83,000						\$ 83,000	\$ 78,780		
2018	1.5	0.86	257,000	\$ 83,000					340,000	290,733		
2019	2.5	0.77	746,000	257,000	\$ 83,000				1,086,000	836,609		
2020	3.5	0.69	1,156,000	746,000	257,000	\$ 83,000			2,242,000	1,555,984		
2021	4.5	0.63	1,378,000	1,156,000	746,000	257,000	\$ 83,000		3,620,000	2,263,368		
2022	5.5	0.56	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	5,106,000	2,876,103		
2023	6.5	0.51	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	6,448,000	3,272,093		
2024	7.5	0.46	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	7,842,000	3,585,127		
2025	8.5	0.41	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	8,565,000	3,527,622		
2026	9.5	0.37	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	8,673,000	3,218,111		
2027	10.5	0.33	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	8,425,000	2,816,298		
2028	11.5	0.30	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	7,906,000	2,380,908		
2029	12.5	0.27	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	7,310,000	1,983,262		
2030	13.5	0.24	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	6,367,000	1,556,233		
2031	14.5	0.22	516,000	708,000	829,000	967,000	1,130,000	1,264,000	5,414,000	1,192,161		
2032	15.5	0.20	416,000	516,000	708,000	829,000	967,000	1,130,000	4,566,000	905,795		
2033	16.5	0.18	374,000	416,000	516,000	708,000	829,000	967,000	3,810,000	680,920		
2034	17.5	0.16	294,000	374,000	416,000	516,000	708,000	829,000	3,137,000	505,083		
2035	18.5	0.15	283,000	294,000	374,000	416,000	516,000	708,000	2,591,000	375,831		
2036	19.5	0.13	187,000	283,000	294,000	374,000	416,000	516,000	2,070,000	270,503		
2037	20.5	0.12	175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	203,551		
2038	21.5	0.11		175,000	187,000	283,000	294,000	374,000	1,313,000	139,258		
2039	22.5	0.10			175,000	187,000	283,000	294,000	939,000	89,722		
2040	23.5	0.09				175,000	187,000	283,000	645,000	55,523		
2041	24.5	0.08					175,000	187,000	362,000	28,073		
2042	25.5	0.07						175,000	175,000	12,226		
Notes:									\$ 100,764,000	\$ 34,699,877		
											66%	

[1] Uses mid-year convention

[2] 15% discount rate less assumed 4% long-term growth rate

California Berry Cultivars vs. University of California

Exhibit 8: Lost Revenue Model

Alternate Trend Analysis Projections

Net Discount Rate 11% [2]

Years of Delay 7 Years

		<i>A</i>	<i>B</i>								<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years													
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Subtotal	Present Value		
2018	1.5	0.86	\$ 83,000							\$ 83,000	\$ 70,973		
2019	2.5	0.77	257,000	\$ 83,000						340,000	261,922		
2020	3.5	0.69	746,000	257,000	\$ 83,000					1,086,000	753,702		
2021	4.5	0.63	1,156,000	746,000	257,000	\$ 83,000				2,242,000	1,401,788		
2022	5.5	0.56	1,378,000	1,156,000	746,000	257,000	\$ 83,000			3,620,000	2,039,070		
2023	6.5	0.51	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000		5,106,000	2,591,084		
2024	7.5	0.46	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	6,531,000	2,985,777		
2025	8.5	0.41	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	8,099,000	3,335,693		
2026	9.5	0.37	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	9,311,000	3,454,841		
2027	10.5	0.33	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	9,829,000	3,285,625		
2028	11.5	0.30	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	9,803,000	2,952,193		
2029	12.5	0.27	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	9,392,000	2,548,126		
2030	13.5	0.24	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	8,735,000	2,135,024		
2031	14.5	0.22	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	8,018,000	1,765,562		
2032	15.5	0.20	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	6,883,000	1,365,437		
2033	16.5	0.18	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	5,830,000	1,041,932		
2034	17.5	0.16	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	4,940,000	795,380		
2035	18.5	0.15	294,000	374,000	416,000	516,000	708,000	829,000	967,000	4,104,000	595,295		
2036	19.5	0.13	283,000	294,000	374,000	416,000	516,000	708,000	829,000	3,420,000	446,918		
2037	20.5	0.12	187,000	283,000	294,000	374,000	416,000	516,000	708,000	2,778,000	327,048		
2038	21.5	0.11	175,000	187,000	283,000	294,000	374,000	416,000	516,000	2,245,000	238,107		
2039	22.5	0.10		175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	165,207		
2040	23.5	0.09			175,000	187,000	283,000	294,000	374,000	1,313,000	113,025		
2041	24.5	0.08				175,000	187,000	283,000	294,000	939,000	72,820		
2042	25.5	0.07					175,000	187,000	283,000	645,000	45,063		
2043	26.5	0.06						175,000	187,000	362,000	22,785		
2044	27.5	0.06							175,000	175,000	9,923		

Notes:

\$ 117,558,000

\$ 34,820,319

70%

[1] Uses mid-year convention

[2] 15% discount rate less assumed 4% long-term growth rate

California Berry Cultivars vs. University of California  
Exhibit 8: Lost Revenue Model  
Alternate Trend Analysis Projections

Net Discount Rate 8% [2]  
Years of Delay 4 Years

		<i>A</i>	<i>B</i>			<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years								
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Subtotal	Present Value
2015	0	1	\$ 83,000				\$ 83,000	\$ 83,000
2016	0	1	257,000	\$ 83,000			340,000	340,000
2017	0.5	0.96	746,000	257,000	\$ 83,000		1,086,000	1,045,004
2018	1.5	0.89	1,156,000	746,000	257,000	\$ 83,000	2,242,000	1,997,561
2019	2.5	0.82	1,378,000	1,156,000	746,000	257,000	3,537,000	2,917,935
2020	3.5	0.76	1,486,000	1,378,000	1,156,000	746,000	4,766,000	3,640,583
2021	4.5	0.71	1,425,000	1,486,000	1,378,000	1,156,000	5,445,000	3,851,155
2022	5.5	0.65	1,651,000	1,425,000	1,486,000	1,378,000	5,940,000	3,890,055
2023	6.5	0.61	1,469,000	1,651,000	1,425,000	1,486,000	6,031,000	3,657,084
2024	7.5	0.56	1,264,000	1,469,000	1,651,000	1,425,000	5,809,000	3,261,544
2025	8.5	0.52	1,130,000	1,264,000	1,469,000	1,651,000	5,514,000	2,866,585
2026	9.5	0.48	967,000	1,130,000	1,264,000	1,469,000	4,830,000	2,324,992
2027	10.5	0.45	829,000	967,000	1,130,000	1,264,000	4,190,000	1,867,517
2028	11.5	0.41	708,000	829,000	967,000	1,130,000	3,634,000	1,499,725
2029	12.5	0.38	516,000	708,000	829,000	967,000	3,020,000	1,154,011
2030	13.5	0.35	416,000	516,000	708,000	829,000	2,469,000	873,575
2031	14.5	0.33	374,000	416,000	516,000	708,000	2,014,000	659,804
2032	15.5	0.30	294,000	374,000	416,000	516,000	1,600,000	485,346
2033	16.5	0.28	283,000	294,000	374,000	416,000	1,367,000	383,952
2034	17.5	0.26	187,000	283,000	294,000	374,000	1,138,000	295,956
2035	18.5	0.24	175,000	187,000	283,000	294,000	939,000	226,113
2036	19.5	0.22		175,000	187,000	283,000	645,000	143,812
2037	20.5	0.21			175,000	187,000	362,000	74,735
2038	21.5	0.19				175,000	175,000	33,452
Notes:							\$ 67,176,000	\$ 37,573,497

[1] Uses mid-year convention  
[2] 12% discount rate less assumed 4% long-term growth rate

California Berry Cultivars vs. University of California  
Exhibit 8: Lost Revenue Model  
Alternate Trend Analysis Projections

Net Discount Rate 8% [2]  
Years of Delay 5 Years

		<i>A</i>	<i>B</i>						<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Subtotal	Present Value		
2016	0	1	\$ 83,000					\$ 83,000	\$ 83,000		
2017	0.5	0.96	257,000	\$ 83,000				340,000	327,165		
2018	1.5	0.89	746,000	257,000	\$ 83,000			1,086,000	967,596		
2019	2.5	0.82	1,156,000	746,000	257,000	\$ 83,000		2,242,000	1,849,593		
2020	3.5	0.76	1,378,000	1,156,000	746,000	257,000	\$ 83,000	3,620,000	2,765,193		
2021	4.5	0.71	1,486,000	1,378,000	1,156,000	746,000	257,000	5,023,000	3,552,682		
2022	5.5	0.65	1,425,000	1,486,000	1,378,000	1,156,000	746,000	6,191,000	4,054,433		
2023	6.5	0.61	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	7,096,000	4,302,880		
2024	7.5	0.56	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	7,409,000	4,159,886		
2025	8.5	0.52	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	7,295,000	3,792,481		
2026	9.5	0.48	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	6,939,000	3,340,190		
2027	10.5	0.45	967,000	1,130,000	1,264,000	1,469,000	1,651,000	6,481,000	2,888,634		
2028	11.5	0.41	829,000	967,000	1,130,000	1,264,000	1,469,000	5,659,000	2,335,428		
2029	12.5	0.38	708,000	829,000	967,000	1,130,000	1,264,000	4,898,000	1,871,638		
2030	13.5	0.35	516,000	708,000	829,000	967,000	1,130,000	4,150,000	1,468,343		
2031	14.5	0.33	416,000	516,000	708,000	829,000	967,000	3,436,000	1,125,664		
2032	15.5	0.30	374,000	416,000	516,000	708,000	829,000	2,843,000	862,400		
2033	16.5	0.28	294,000	374,000	416,000	516,000	708,000	2,308,000	648,252		
2034	17.5	0.26	283,000	294,000	374,000	416,000	516,000	1,883,000	489,705		
2035	18.5	0.24	187,000	283,000	294,000	374,000	416,000	1,554,000	374,207		
2036	19.5	0.22	175,000	187,000	283,000	294,000	374,000	1,313,000	292,753		
2037	20.5	0.21		175,000	187,000	283,000	294,000	939,000	193,856		
2038	21.5	0.19			175,000	187,000	283,000	645,000	123,296		
2039	22.5	0.18				175,000	187,000	362,000	64,073		
2040	23.5	0.16					175,000	175,000	28,680		
								<u>\$ 83,970,000</u>	<u>\$ 41,962,027</u>		

Notes:

[1] Uses mid-year convention  
[2] 12% discount rate less assumed 4% long-term growth rate

50%

California Berry Cultivars vs. University of California

Exhibit 8: Lost Revenue Model

Alternate Trend Analysis Projections

Net Discount Rate 8% [2]  
Years of Delay 6 Years

		<i>A</i>	<i>B</i>							<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Year	Years Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Subtotal	Present Value		
2017	0.5	0.96	\$ 83,000						\$ 83,000	\$ 79,867		
2018	1.5	0.89	257,000	\$ 83,000					340,000	302,931		
2019	2.5	0.82	746,000	257,000	\$ 83,000				1,086,000	895,922		
2020	3.5	0.76	1,156,000	746,000	257,000	\$ 83,000			2,242,000	1,712,586		
2021	4.5	0.71	1,378,000	1,156,000	746,000	257,000	\$ 83,000		3,620,000	2,560,364		
2022	5.5	0.65	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	5,106,000	3,343,876		
2023	6.5	0.61	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	6,448,000	3,909,945		
2024	7.5	0.56	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	7,842,000	4,403,000		
2025	8.5	0.52	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	8,565,000	4,452,721		
2026	9.5	0.48	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	8,673,000	4,174,877		
2027	10.5	0.45	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	8,425,000	3,755,091		
2028	11.5	0.41	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	7,906,000	3,262,749		
2029	12.5	0.38	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	7,310,000	2,793,318		
2030	13.5	0.35	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	6,367,000	2,252,756		
2031	14.5	0.33	516,000	708,000	829,000	967,000	1,130,000	1,264,000	5,414,000	1,773,674		
2032	15.5	0.30	416,000	516,000	708,000	829,000	967,000	1,130,000	4,566,000	1,385,057		
2033	16.5	0.28	374,000	416,000	516,000	708,000	829,000	967,000	3,810,000	1,070,121		
2034	17.5	0.26	294,000	374,000	416,000	516,000	708,000	829,000	3,137,000	815,828		
2035	18.5	0.24	283,000	294,000	374,000	416,000	516,000	708,000	2,591,000	623,919		
2036	19.5	0.22	187,000	283,000	294,000	374,000	416,000	516,000	2,070,000	461,538		
2037	20.5	0.21	175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	356,951		
2038	21.5	0.19		175,000	187,000	283,000	294,000	374,000	1,313,000	250,989		
2039	22.5	0.18			175,000	187,000	283,000	294,000	939,000	166,200		
2040	23.5	0.16				175,000	187,000	283,000	645,000	105,706		
2041	24.5	0.15					175,000	187,000	362,000	54,932		
2042	25.5	0.14						175,000	175,000	24,589		
Notes:									\$ 100,764,000	\$ 44,989,505		
											55%	

[1] Uses mid-year convention

[2] 12% discount rate less assumed 4% long-term growth rate



California Berry Cultivars vs. University of California

Exhibit 8: Lost Revenue Model

Alternate Trend Analysis Projections

Net Discount Rate 8% [2]  
Years of Delay 7 Years

		<i>A</i>	<i>B</i>								<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years													
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Subtotal	Present Value		
2018	1.5	0.89	\$ 83,000							\$ 83,000	\$ 73,951		
2019	2.5	0.82	257,000	\$ 83,000						340,000	280,491		
2020	3.5	0.76	746,000	257,000	\$ 83,000					1,086,000	829,558		
2021	4.5	0.71	1,156,000	746,000	257,000	\$ 83,000				2,242,000	1,585,728		
2022	5.5	0.65	1,378,000	1,156,000	746,000	257,000	\$ 83,000			3,620,000	2,370,707		
2023	6.5	0.61	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000		5,106,000	3,096,181		
2024	7.5	0.56	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	6,531,000	3,666,921		
2025	8.5	0.52	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	8,099,000	4,210,459		
2026	9.5	0.48	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	9,311,000	4,481,988		
2027	10.5	0.45	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	9,829,000	4,380,865		
2028	11.5	0.41	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	9,803,000	4,045,627		
2029	12.5	0.38	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	9,392,000	3,588,898		
2030	13.5	0.35	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	8,735,000	3,090,596		
2031	14.5	0.33	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	8,018,000	2,626,767		
2032	15.5	0.30	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	6,883,000	2,087,899		
2033	16.5	0.28	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	5,830,000	1,637,482		
2034	17.5	0.26	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	4,940,000	1,284,728		
2035	18.5	0.24	294,000	374,000	416,000	516,000	708,000	829,000	967,000	4,104,000	988,252		
2036	19.5	0.22	283,000	294,000	374,000	416,000	516,000	708,000	829,000	3,420,000	762,540		
2037	20.5	0.21	187,000	283,000	294,000	374,000	416,000	516,000	708,000	2,778,000	573,516		
2038	21.5	0.19	175,000	187,000	283,000	294,000	374,000	416,000	516,000	2,245,000	429,147		
2039	22.5	0.18		175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	306,028		
2040	23.5	0.16			175,000	187,000	283,000	294,000	374,000	1,313,000	215,182		
2041	24.5	0.15				175,000	187,000	283,000	294,000	939,000	142,490		
2042	25.5	0.14					175,000	187,000	283,000	645,000	90,626		
2043	26.5	0.13						175,000	187,000	362,000	47,095		
2044	27.5	0.12							175,000	175,000	21,081		
Notes:											\$ 117,558,000	\$ 46,914,804	60%

[1] Uses mid-year convention

[2] 12% discount rate less assumed 4% long-term growth rate



California Berry Cultivars vs. University of California

Exhibit 8: Lost Revenue Model

Alternate Trend Analysis Projections

Net Discount Rate 3.5% [2]  
Years of Delay 8 Years

		<i>A</i>	<i>B</i>									<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years														
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Cultivar#8	Subtotal	Present Value		
2019	2.5	0.92	\$ 83,000								\$ 83,000	\$ 76,160		
2020	3.5	0.89	257,000	\$ 83,000							340,000	301,431		
2021	4.5	0.86	746,000	257,000	\$ 83,000						1,086,000	930,247		
2022	5.5	0.83	1,156,000	746,000	257,000	\$ 83,000					2,242,000	1,855,512		
2023	6.5	0.80	1,378,000	1,156,000	746,000	257,000	\$ 83,000				3,620,000	2,894,652		
2024	7.5	0.77	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000			5,106,000	3,944,829		
2025	8.5	0.75	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000		6,531,000	4,875,136		
2026	9.5	0.72	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	8,182,000	5,901,007		
2027	10.5	0.70	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	9,568,000	6,667,262		
2028	11.5	0.67	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	10,575,000	7,119,776		
2029	12.5	0.65	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	10,959,000	7,128,802		
2030	13.5	0.63	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	10,770,000	6,768,945		
2031	14.5	0.61	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	10,221,000	6,206,665		
2032	15.5	0.59	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	9,443,000	5,540,316		
2033	16.5	0.57	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	8,534,000	4,837,677		
2034	17.5	0.55	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	7,299,000	3,997,673		
2035	18.5	0.53	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	6,204,000	3,283,034		
2036	19.5	0.51	294,000	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	5,234,000	2,676,066		
2037	20.5	0.49	283,000	294,000	374,000	416,000	516,000	708,000	829,000	967,000	4,387,000	2,167,157		
2038	21.5	0.48	187,000	283,000	294,000	374,000	416,000	516,000	708,000	829,000	3,607,000	1,721,586		
2039	22.5	0.46	175,000	187,000	283,000	294,000	374,000	416,000	516,000	708,000	2,953,000	1,361,776		
2040	23.5	0.45		175,000	187,000	283,000	294,000	374,000	416,000	516,000	2,245,000	1,000,272		
2041	24.5	0.43			175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	744,314		
2042	25.5	0.42				175,000	187,000	283,000	294,000	374,000	1,313,000	546,117		
2043	26.5	0.40					175,000	187,000	283,000	294,000	939,000	377,352		
2044	27.5	0.39						175,000	187,000	283,000	645,000	250,438		
2045	28.5	0.38							175,000	187,000	362,000	135,803		
2046	29.5	0.36								175,000	175,000	63,430		
Notes:												\$ 134,352,000	\$ 83,373,435	38%

[1] Uses mid-year convention

[2] 7.5% discount rate less assumed 4% long-term growth rate

California Berry Cultivars vs. University of California

Exhibit 8: Lost Revenue Model

Alternate Trend Analysis Projections

Net Discount Rate 16% [2]  
Years of Delay 8 Years

		<i>A</i>	<i>B</i>									<i>C</i>	<i>D = sum B:C</i>	<i>E = A * D</i>
Years														
Year	Discounted	PV Factor [1]	Cultivar#1	Cultivar#2	Cultivar#3	Cultivar#4	Cultivar#5	Cultivar#6	Cultivar#7	Cultivar#8	Subtotal	Present Value		
2019	2.5	0.69	\$ 83,000								\$ 83,000	\$ 57,271		
2020	3.5	0.59	257,000	\$ 83,000							340,000	202,244		
2021	4.5	0.51	746,000	257,000	\$ 83,000						1,086,000	556,889		
2022	5.5	0.44	1,156,000	746,000	257,000	\$ 83,000					2,242,000	991,098		
2023	6.5	0.38	1,378,000	1,156,000	746,000	257,000	\$ 83,000				3,620,000	1,379,532		
2024	7.5	0.33	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000			5,106,000	1,677,436		
2025	8.5	0.28	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000		6,531,000	1,849,638		
2026	9.5	0.24	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	\$ 83,000	8,182,000	1,997,600		
2027	10.5	0.21	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	257,000	9,568,000	2,013,781		
2028	11.5	0.18	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	746,000	10,575,000	1,918,728		
2029	12.5	0.16	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	1,156,000	10,959,000	1,714,139		
2030	13.5	0.13	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	1,378,000	10,770,000	1,452,221		
2031	14.5	0.12	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	1,486,000	10,221,000	1,188,099		
2032	15.5	0.10	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	1,425,000	9,443,000	946,261		
2033	16.5	0.09	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	1,651,000	8,534,000	737,218		
2034	17.5	0.07	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	1,469,000	7,299,000	543,561		
2035	18.5	0.06	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	1,264,000	6,204,000	398,290		
2036	19.5	0.06	294,000	374,000	416,000	516,000	708,000	829,000	967,000	1,130,000	5,234,000	289,670		
2037	20.5	0.05	283,000	294,000	374,000	416,000	516,000	708,000	829,000	967,000	4,387,000	209,305		
2038	21.5	0.04	187,000	283,000	294,000	374,000	416,000	516,000	708,000	829,000	3,607,000	148,354		
2039	22.5	0.04	175,000	187,000	283,000	294,000	374,000	416,000	516,000	708,000	2,953,000	104,703		
2040	23.5	0.03		175,000	187,000	283,000	294,000	374,000	416,000	516,000	2,245,000	68,620		
2041	24.5	0.03			175,000	187,000	283,000	294,000	374,000	416,000	1,729,000	45,559		
2042	25.5	0.02				175,000	187,000	283,000	294,000	374,000	1,313,000	29,825		
2043	26.5	0.02					175,000	187,000	283,000	294,000	939,000	18,388		
2044	27.5	0.02						175,000	187,000	283,000	645,000	10,888		
2045	28.5	0.01							175,000	187,000	362,000	5,268		
2046	29.5	0.01								175,000	175,000	2,195		
Notes:											\$ 134,352,000	\$ 20,556,783		
[1] Uses mid-year convention													85%	
[2] 20% discount rate less assumed 4% long-term growth rate														

# Exhibit 9

From: [Alexis Smith](#)  
To: [Chivvis, Matthew Alan](#); [Krevans, Rachel](#); [Patterson, Elizabeth Ann](#); [Ewerdt, Jake](#)  
Cc: [California Berry Cultivars-JonesDay](#)  
Subject: [EXT] Expert Disclosure - David Nolte  
Date: Wednesday, January 18, 2017 5:20:26 PM  
Attachments: [2012 Nolte Testimonies.pdf](#)  
[Nolte executed Ex A.PDF](#)  
[Nolte Resume Short.pdf](#)  
[Rule 26 requirements - 2013 through 2016.pdf](#)

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Matthew,

Pursuant to section 7.4 of the Protective Order, CBC, Shaw, and Larson disclose David Nolte as an expert with whom we intend to disclose University produced financial information relating to the strawberry breeding program (including, but not limited to, royalty and expense information) and other information relating to each party's damages claims. His signed acknowledgement of the protective order, resume, and information pertaining to the items requested under section 7.4(a)(2) under the protective order are attached below.

David Nolte resides in La Habra Heights, California. His current employer is Fulcrum Inquiry and all of his employment income for more than the past five years is and has been from Fulcrum Inquiry.

We ask that you please let us know as soon as possible if we have permission to share information designated by the University in this matter or if you have any concerns.

Regards,

Lexi

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Associate  
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# **Exhibit 10**

**From:** [Krevans, Rachel](#)  
**To:** [Gregory L Lippetz](#); [Alexis Smith](#)  
**Cc:** [california\\_berry\\_cultivars\\_jonesday@jonesday.com](#); [Chivvis, Matthew Alan](#); [CBC UCRegents](#)  
**Subject:** CBC v. UC - Crossclaim Defendants" Disclosure of Damages Experts  
**Date:** Friday, January 20, 2017 9:39:09 PM

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Greg,

Despite Crossclaim Defendants' extremely late disclosures and the lack of any excuse for that lateness, we have devoted significant effort to expedite our vetting, have completed our review for your three damages experts, and consulted with our client. This is to inform you that the University does not object to the disclosure of confidential information to CBC's proposed damages experts: Richard J. Eichmann, Thomas R. McCarthy, and David Nolte.

The University is reviewing Mark Sorrells, who was disclosed just this afternoon, and will provide a response regarding Mr. Sorrells as soon as our vetting and client consultation is complete. Given the number of things we need to follow up on, I can tell you it will not be before Monday and it may not be possible by Monday.

Please do not take the fact that we went to a huge effort to solve this problem for you multiple times in the past weeks, at a time when as you know we are extraordinarily busy with key deadlines of our own, as a sign that we will continue to do so. We expect that you will plan your activities in a more orderly fashion going forward.

Rachel

# **Exhibit 11**

From: [Alexis Smith](#)  
To: [Chivvis, Matthew Alan](#); [Krevans, Rachel](#); [Patterson, Elizabeth Ann](#); [Ewerdt, Jake](#); [Overson, Wesley E.](#)  
Cc: [California Berry Cultivars-JonesDay](#)  
Subject: [EXT] CBC v. UC - FRCP 26(a)(2) Disclosures  
Date: Saturday, January 21, 2017 8:33:54 PM  
Attachments: [CBC v UC - CBC Expert Disclosure - Shaw and Westwood.pdf](#)  
[CBC initial report with exhibits.pdf](#)

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Counsel,

Attached are the FRCP 26(a)(2) disclosures of Douglas Shaw, Lucky Westwood, and David Nolte.

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